

B.C. Nirmal
Rajnish Kumar Singh *Editors*

Contemporary Issues in International Law

Environment, International Trade,
Information Technology and Legal
Education

SATYAM LAW
INTERNATIONAL

 Springer

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B.C. Nirmal · Rajnish Kumar Singh
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Technology and Legal Education

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Foreword

Rapid growth of new technology, innovative techniques of exploitation of resources and novel patterns of trading present a challenge to international law. International agencies and institutions are shaping the domestic policies. Developments at Bali conference relating to subsidies and trade facilitation show that even aspects like minimum support price to farmers of a country are to be decided by global forces. In an age when WTO is becoming, perhaps, more important than United Nations, one needs to give a fresh look to the contemporary face of international law.

In this context, the present volume on ‘Contemporary issues in International Law’ (Environment, International Trade, International Technology and Legal Education) comes as a wave of fresh air. Today, we stand at the crossroads of new international and national legal and policy developments. The negotiations at the WTO and the concern for conservation of environment and safe cyber transactions highlight the growing importance of national and international norm-setting in these areas. These international developments are bound to influence the domestic law and policy.

The editors have selected those issues of international law which have emerged as a result of the advent of modern information technology. The connection between the topics of environment, trade, information technology is apparent from the fact that ultimately it is the method of doing business which is causing dents in the traditional understanding of principles and liabilities in international law. The present volume is scholarly and readable. It contains quite well-researched contributions and answers technical questions pertaining to the topics covered. It presents an intelligent sense of conceptual and contextual aspects of environment, trade, information technology and legal education that is in tune with certain ideas and experiences of readers and lawmakers. At the same time, the book keeps a reader engaged by providing details of the subject in lucid and easy to understand manner. It is certainly a good reading for researchers and policy makers alike.

The editors have selected and arranged chapters under various sub-themes covering almost all the recent issues in the subjects. The concerns of the developing nations are sufficiently reflected in the volume. The special focus on Indian position on various topics adds immense value to the book.

The national and international norm-setting must take into account the sensitivity of developed as well as developing nations. It presents views from India, Nepal, Bangladesh, Malaysia, Nigeria and England. I wish and hope that it becomes one of the well-cited book on the subjects of international environment, trade, information technology and legal education. I commend the book to academics and policy makers.

I wish the editors and the Law School, Banaras Hindu University all success in all the future academic endeavours.



New Delhi, India
January 2014

Dr. B.S. Chauhan
Judge, Supreme Court of India^{*}

*Justice B.S. Chauhan was a judge of the Supreme Court of India from May 2009 to July 2014. He has since then retired.

Preface

One direct consequence of contemporary changes in international law is the diminishing power of the state and its capacity to deal with the economic matters challenging the existing notions of territory, sovereignty and nation. The state seems to be no longer the centre point of discussions in international law and the decision-making process at the global level is no longer a monopoly of the states as was the case in the twentieth century because the state is now operating within an increasingly diverse matrix of transnational interactions involving other states, inter-governmental institutions, corporations and whole range of cross-border groups and networks.

In an attempt to explore the changing nature of international law and its ability to respond to the rapid changes brought about by the contemporary issues related to international environment, trade and information technology the present volume, '**Contemporary Issues in International Law**' (Environment, International Trade, Information Technology, and Legal Education) brings together the ideas deliberated by a cross section of scholars from Asia, Africa and Europe during the first ever 2-day International Conference on 'International Environmental Law, Trade Law, Information Technology Law, and Legal Education' organized by the Faculty of Law, Banaras Hindu University on March 2–3, 2013. Hon'ble Mrs. Justice Ranjana Prakash Desai, Judge Supreme Court of India and Hon'ble Mr. Justice S.P. Mehrotra, Judge Allahabad High Court delivered the inaugural and valedictory lectures respectively. Hon'ble Mr. Justice R.S.R. Maurya, Judge Allahabad High Court also delivered a special lecture in the inaugural session. The conference was attended by more than 400 participants including delegates from England, Nigeria, South Africa, Malaysia, Bangladesh, Nepal and India. The present volume contains select papers from all the sessions and is divided in 44 chapters apart from an Introduction by the editors.

We express our sincere gratitude to Hon'ble Dr. Justice B.S. Chauhan, retired Judge Supreme Court of India, who being an illustrious alumni of Law School, BHU has always remained a constant source of inspiration to us. Our special thanks are due to His Lordship for his readiness in writing a Foreword for the book.

It is our proud privilege to express our gratitude to Hon'ble Mrs. Justice Ranjana P. Desai for inaugurating the conference and to Hon'ble Justice S.P. Mehrotra and Hon'ble Justice R.S.R. Maurya for their graceful presence during the conference. We wish to express our sincere thanks to Dr. Lalji Singh, the then Vice-Chancellor of Banaras Hindu University, for being kind enough to extend all help and support for making the conference a grand success. We are thankful to Prof. D.N. Jauhar, Former Vice-Chancellor, Agra University and Prof. A. Lakshminath, Vice-Chancellor, Chanakya National Law University, Patna, for gracing the occasion by their presence. We acknowledge the contributions of all the participants. The faculty is indebted to them for their valuable papers.

We thank all the faculty members of the Law School, Banaras Hindu University for their cooperation and encouragement. Our special thanks are due to Prof. M. P. Singh, Prof. D.P. Verma and Prof. B.N. Pandey for their wise advices, support and blessings. We are equally thankful to the staff of Law School for their generous assistance.

The editorial assistance provided by Mr. Digvijay Singh, Research Scholar, Law School, BHU is highly appreciated.

We also owe special thanks to M/s Satyam Books, New Delhi for bringing out the Indian edition of this volume in its present form.

We are mindful of our own limitations as well as of this work. The fields of law explored in the present work are so broad that it is impossible within the limits of one volume book to deal with the each and every aspects of the subject in detail; however, care has been taken to select papers on diverse issues. We will consider our labour fruitful if this book engenders some interest on the contemporary issues of international law and serves the purpose for which it has been designed. The views expressed in the various chapters comprising this work are necessarily those of the respective authors, neither the editors, whether individually or collectively, nor the Law School, Banaras Hindu University is responsible for them. Finally, we dedicate the work to the cherished memory of our founder Pt. Madan Mohan Malaviya Ji. The first Indian edition of the book published in 2014 was designed to commemorate his 150th Birth Anniversary.

Varanasi, Uttar Pradesh, India
February 2014

B.C. Nirmal
Rajnish Kumar Singh

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Chapter 1

Introduction

B.C. Nirmal and Rajnish Kumar Singh

International trading activities are increasing at a great pace. National governments nowadays often find it difficult to evolve policies to regulate the implications arising out of new world economic order. International environmental law, Legal Education and Information technology law are the areas which experience the change the most. These areas may seem to be distinct but are in fact closely interrelated. The tremendous growth of information technology has provided immense opportunities for international trade and commerce and expanding trading activities are leading to global environmental crises. It is important to note that these areas need to be regulated by proper legal framework at the international level. One thing which all the above issues share in common is the transnational character of the problems which are associated with them. This book makes an endeavor to put together the studies on the contemporary issues associated with the topics of international environmental law, international trade law, information technology law, and legal education at the global level. The book contains four parts with each part sub-divided into chapters.

Apart from the contributions by the academic scholars the book contains scholarly papers by Justice Ranjan Prakash Desai on “Legal Education”, Justice S. P. Mehrotra on “International Environmental Law, Trade Law, Information Technology Law and Legal Education” and Justice R.S.R. Maurya on “Environmental Pollution and its Control.”

Justice Desai notes that Legal education has now assumed great importance. Its importance can be measured by the number of bright students who now choose law above other disciplines. Law has a dynamic role to play as an instrument of

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progress. Legal education teaches how to use law for the betterment of society. The survival of democracy and rule of law is possible only if the legal education inspires lawyers to use law as a tool for their preservation.

She emphasizes that advocates must have knowledge of economics, political science, sociology, and psychology. There is an increasing interaction between technology and law. Some amount of knowledge of relevant technology is essential for a modern lawyer. Justice Desai recommends that legal education must now contain a separate subject entitled "Laws Relating to Women and their Effective Implementation." She also argues for giving importance to compromises over litigation. She concludes that Legal education widens ones horizon, it sharpens our intellect, it makes our mind analytical, and it sensitizes us towards the problems of others.

Justice S.P. Mehrotra presents his views on all the four areas covered by the book. At the outset he notes that adoption of concepts of globalization and liberalization and rapid developments in various fields of science and technology are fast diluting the relevance of national boundaries and barriers. These laws are intended to deal with problems and challenges which the world community is facing while pursuing the path of development. Legal Education must keep pace within these new phenomena.

Justice R.S.R. Maurya in his paper "Environmental Pollution and its Control" notes that the world has reached a level of growth in the twenty-first century as never thought before while the crisis of economic growth is still persisting. The key questions which often arise are as to whether economic growth can supersede the concern for environmental protection, and whether sustainable development, which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of humanity and future generations, could be ignored in the garb of economic growth or compelling human necessity. He concludes that one must realize the difference between need and wastage in order to protect the natural resources from wastage.

1 Part II: International Environmental Law

International environmental law is an area of public international law marked by the application of principles which have evolved in the environmental context, such as the precautionary and no harm principles. It also draws from the general corpus of public international law.¹ The "environment" is an amorphous term that has thus far proved incapable of precise legal definition saves in particular contexts. Environment includes natural resources both abiotic and biotic, such as the air, water, soil, fauna and flora and the interaction between the same factors; property

¹Malcolm D. Evans, *International Law* (Oxford university Press, 2nd ed.,) at 657.

which forms part of the cultural heritage; and the characteristic aspects of the landscape.²

Notwithstanding some early twentieth-century conservation treaties, modern international environmental law basically came into being in the 1970s. It includes both global environmental agreements with large numbers of parties; regional pacts, such as agreements managing various transboundary water bodies and air sheds; and some customary law. International environmental law, however, often addresses problems that have their roots in some of the unfortunate by-products of private productive activities. Thus, the Convention to Regulate International Trade in Endangered Species of Flora and Fauna (CITES) addresses the sale of animal parts in international trade, an economically valuable activity. The Montreal Protocol on Ozone-Depleting Substances addresses substances serving valuable economic functions, refrigerating food, cooling down cars, acting as solvents in a variety of industrial processes, and protecting crops from pests. The Kyoto Protocol to the United Nations Framework Convention on Climate Change addresses the burning of fossil fuels, an economic activity at the heart of transportation, manufacturing, and the production of electricity for homes and offices.³

Global environmental law's content is the common set of legal principles developed by national, international, and transnational environmental regulatory systems. It includes substantive values, principles, and procedural approaches. Among the most readily identifiable principles and tools are the precautionary principle, polluter pays, environmental impact assessment, and polluting permitting. One might also readily assert that protection of public health and the integrity of ecology systems are among the most important substantive goals in environmental law.⁴ Global environmental law is thus the manifestation of complementary trends of proliferation of environmental treaties and other international legal instruments, rapid development of national environmental law and governance systems across the world, and the growing importance of transnational law. It represents the inevitable realization that effective solutions to global environmental problems require not only government-to-government legal commitments, but also the development of law and governance institutions at the national and sub-national level. Such law and governance institutions are critical not only to engage national governments but also to allow for effective intervention into the role of the private sector and individuals in environmental degradation.⁵

The precautionary “approach” teaches that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for

²The Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous for the Environment, 1993, Article 2(10).

³David M. Driesen, “Environmental Protection, Free Trade and Democracy”, AAPSS, 2006, at 603.

⁴Tseming Yang and Robert V. Percival, “The Emergence of Global Environmental Law”, 36 *Ecology Law Quarterly*, 2009, at 623.

⁵Tseming Yang, “The Top 10 Trends in International Environmental Law”, available at: <http://digitalcommons.law.scu.edu/facpubs/769>, at 3 [accessed on October 20, 2013].

postponing cost-effective measures to prevent environmental degradation.”⁶ The polluter pays principle in environmental law means that the party responsible for producing pollution should also be responsible for paying for the damage done as a result of that pollution to the national environment.⁷ The extended polluter responsibility which was first described by the Swedish government in 1975 means that the cost of pollution is to be internalized into the cost of the product to shift responsibility of dealing with pollution from governments to those responsible.⁸

The concept of sustainable development was defined by the famous Brundtland Report of 1987, the World Commission on Environment and Development. Sustainable development “meets the needs of the present without compromising the ability of future generations to meet their own needs.” The international community’s most recent comprehensive statement on sustainable development, the Johannesburg Declaration on Sustainable Development, is almost entirely silent on the question of the rights of future generations. In the entire 37-paragraph document, there are but two references to responsibilities to “future generations.” In Paragraph 6, there is a declaration of “our responsibility to one another, to the greater community of life and to our children.” In Paragraph 37, the conferees “solemnly pledge to the peoples of the world and the generations that will surely inherit this Earth that we are determined to ensure that our collective hope for sustainable development is realized.” Neither the declaration of responsibility “to our children” nor the pledge to “the generations that will surely inherit this Earth” implies the existence of any duty—moral or legal—to preserve the environment for their benefit.⁹

The above identified substantive international environmental law may be understood in the context of protection of marine environment, protection of the atmosphere, nuclear risks, other hazardous substances and activities, and conservation of nature.

The protection of the marine environment was one of the key issues at the 1972 Stockholm Conference. Pollution of the ocean, and concerns about their limited absorption capacity, formed a key thrust of 1970s law making activities. Dumping is one area of regulatory activity where this progression is particular marked.

In relation to protection of atmosphere there are three principle areas of international regulatory activity, these are transboundary air pollution, ozone depletion, and global warming. The *Trail Smelter* arbitration was an early instance of an inter-State claim arising in respect of harmful transboundary effects of air-borne pollutants. This case involved a single detectable source of air pollution (sulfur dioxide emissions from the smelter) causing quantified harm to health and property.

⁶The Rio Declaration on Environment and Development, 1992, Principle-15.

⁷*Id.*, Principle-16.

⁸See also OECD document “Extended Polluter Responsibility”, 2006.

⁹Jonathan C. Carlson, “International Environmental Law, Climate Change, and Intergenerational Justice”, 8 *CLI Background Paper*, 2009, at 17 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1525018. [accessed on October 22, 2013].

Problem arises if the sources of air pollution are diffused and its harmful effects upon environment are widespread. The purpose of 1979 LRTAP is to prevent, reduce, and control transboundary air pollution from both new and existing sources.

In relation to ozone depletion the United Nations Environment Programme (UNEP) in 1981 launched negotiations for the conclusion of a treaty, culminating in the adoption of the 1985 Vienna Convention for the Protection of the Ozone layer. The 1987 Montreal Protocol—like the 1997 Kyoto Protocol to the Climate Change Convention—radically altered this picture in several respects. In addition to introducing specific targets for the reduction and eventual elimination of ozone-depleting substances, subsequent adjustments or amendments of the Protocol have introduced financial (the multilateral funds) and technical incentives to encourage developing country adherence to the Protocol.

The 1992 UN Framework Convention on Climate Change was one of two treaties adopted at the Rio Conference. The principle objective of the Convention is “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” Notwithstanding the obligations contained in Article 4, it was not until the negotiation of the 1997 Kyoto Protocol that developed country parties committed themselves to explicit targets for the reduction of the chief greenhouse gases and to the development of international mechanism for ensuring the fulfillment of these commitments. The core obligation of the Protocol is contained in Article 3(1) which states that Annex I parties “shall, individually or jointly, ensure that their aggregate anthropocentric carbon dioxide equivalent emission” of specific greenhouse gas “do not exceed their assigned amounts” and that overall emission of such parties are reduced by at least 5% below 1990 levels in the commitment period 2008–2012.

The nuclear sector has been the subject of considerable regulatory activities at the international level. At the regional level, the 1960 Paris Convention on Third-Party Liability in the Field of Nuclear Energy and the 1963 Brussels Supplementary Convention, as amended, were adopted under the auspices of the Nuclear Energy Agency of the Organization for Economic Cooperation and Development (OECD). The 1994 Convention on Nuclear Safety is designed to ensure the safe operation of land-based nuclear power plants.

Apart from the nuclear sector there has also been considerable regulation of other hazardous activities and substances. The 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal was the first in the field. Further, the 1998 Rotterdam Convention on Prior informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the 2001 Stockholm Convention on Persistent Organic Pollutants also regulate the field. The 2000 Cartagena Protocol to the 1992 Biodiversity Convention is addressed to the transboundary movement of living modified organisms.

The multilateral species and habitant treaties include, the 1971 Ramsar Convention on Wetlands of International Importance especially as waterfowl Habitant; the 1972 UNESCO Convention Concerning Protection of the World Cultural and Natural Heritage (WHC); the 1973 Convention on International trade in Endangered Species of Wild Fauna and Flora (CITES); the 1979 Bonn

Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention); and the 1992 Convention on Conservation of Biological Diversity (CBD).

Thus as it stands today, international environmental law is made up of a complex web of multilateral regional and bilateral treaties, soft law instruments, principles of customary international law and judicial decisions.¹⁰ Developed in response to a realization on the part of the international community that transboundary pollution cannot be prevented, regulated, and controlled without the international cooperation, international environmental law has been slowly moving from classic State responsibility approach to damage to a regime of international cooperation.¹¹ Here, international cooperation in the field of environmental protection can take such forms as consultation, the exchange of information, notification of environmental risk to potentially affected States and assistance in mitigation of environmental harm. The law in this area also increasingly recognizes the environment's inherent link with human rights and economic development, stresses the importance of environmental impact assessment in the transboundary context, and requires States to comply with due diligence standards in the prevention, reduction and control of pollution. It also establishes a strict liability regime in the case of damage to the environment caused by space objects. Sustainable development, State's common but differential responsibilities, the notion of intergenerational equity, the precautionary approach and the polluter pays principle all contributes to the fabric of contemporary international environmental law.¹²

In India, there is a well-developed legal architecture of environmental protection. Article 48 of the Indian Constitution requires the State to protect and improve the environment and to safeguard the forest and wildlife, and Article 51 A (g) makes it the fundamental duty of every citizen of India to protect and improve the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living creatures. To compliment these constitutional protections, there are over 200 union and state statutes that concern environmental protection directly or indirectly. However, it is believed that the existence of these over 200 statutes has not prevented environmental degradation in India, which, on the contrary, has increased over the years.¹³ These statutes include the Water and Air Acts; and the 1986 Environmental (Protection) Act. The 2010 National Green Tribunal Act (NGTA) is another piece of legislation with far-reaching significance. It provides for establishment of National Green Tribunal for the effective and expeditious disposal of cases related to environment, including the enforcement of legal rights related to environment and to relief and compensation for damage to persons and property. In addition to these landmark environmental statutes, there is a rich corpus

¹⁰B.C. Nirmal, "Nuclear Energy Law and International Environmental Law", 51(2) *Indian Journal of International Law*, 2011, at 62.

¹¹M.N. Shaw, *International Law*, (First South Asian Edition, 2010) at 845.

¹²B.C. Nirmal, *Supra* note 10, pp. 62–63.

¹³*Indian Council of Enviro-Legal Action v. Union of India* AIR 1996 1146.

of homespun environmental jurisprudence that the Indian judiciary has slowly but steadily developed over the years.¹⁴ In particular, the Supreme Court of India has repeatedly held that sustainable development,¹⁵ the precautionary principle, the polluter pays principle,¹⁶ the principle of intergenerational equity¹⁷ and the public trust doctrine¹⁸ are not only part of Indian constitutional law but are also implicitly recognized by existing environmental statutes.

With the above background, Part II of the book seeks to portray the contemporary issues related to the topic of international environmental law. Sudhir Kochhar in his work relates the aspect of food security with sustainable development. He suggests that after two decades, it has been observed at Rio 20+ that only some programs are in place; but funding is still lacking.

The handling of transactions on IPR-protected agrobioresources is a techno-legal matter, which requires authenticity of information disclosed. He finds that it could be worthwhile collecting, collating, and publication of authentic, searchable details of location-specific agrobioresources. Coupled with this, the public or searchable databases of appropriate technologies for specific use of these biological/genetic resources would be relevant in stepping-up formal and effective material transfers and benefit sharing arrangements to eventually promote their sustainable use prospects.

Andrew Ejovwo Abuza brings to fore the discussion on the United Nations Conference on Sustainable Development held in June 2012 in Rio de Janeiro. The chapter was not originally presented in the conference; however, it was invited by the editors to add the dimension of RIO+20 to the book. Abuza refers to the 1992 United Nations Conference on Environment and Development which produced several international environmental agreements. He opines that it is rather sad that 20 years after the Conference these agreements have not been fully implemented. Worse still, the 2012 United Nations Conference on Sustainable Development held as a 20-year follow-up to the 1992 Conference failed to take concrete actions to fully implement these agreements. The chapter reflects on Post-Rio discussions on environmental protection. Abuza concludes that international efforts to tackle environmental challenges as represented by international environmental agreements have not yielded the desired results. He suggests that there is need for states to rise above pettiness and other parochial interests and conclude legally binding environmental agreements and be prepared to meet their obligations under same or face appropriate sanctions. He emphasizes that government needs to partner with the people on environmental issues as enjoined by Rio Declarations.

¹⁴B.C. Nirmal, *Supra* note 10, at 72.

¹⁵*Vellor Welfare Forum* AIR 1996 SC 2715; *Bombay Dyeing and Mfg. Co. Ltd. v. Bombay Environmental Action Group* (2006) 3 SCC 434; *Narmada Bachao Andolan v. Union of India* (2002) 10 SCC 664.

¹⁶As regards the standard of care required for hazardous or inherently dangerous operations, see *M. C. Mehta v. Union of India*, (1987) SCR 819.

¹⁷*State of Orissa and Sri Jagannath Temple Puri Management Comm. v. Chintamani Khuntia* AIR 1997 SC 811.

¹⁸*M.C. Mehta v. Kamal Nath* (1999) 6 SCC 464; *Intellectual Forum Tirupati* AIR 2006 SC 1350.

Gazi Saiful Hasan and Sheikh Ashrafur Rahaman analyze the origin and status of principles of international environmental law and the impact of these principles on national laws of Bangladesh. As Bangladesh is in vulnerable condition in terms of environmental hazards, it is ripe time to take measures for preventing and mitigating such calamitous situation as well as for promoting and protecting the quality of environment. Hasan and Rahaman wrote that domestic environmental laws of most of the countries of the world are getting shaped on the basis of different international initiatives. Bangladesh is also trying to adopt these principles in various enactments.

V. Rajyalakshmi at the outset notes that climate change due to global warming is a challenge that is yet unmet. Despite the long-held understanding that global warming is more due to human activities than the natural causes and hence the solution to the problem also lies to a great part in our plans and actions, nothing remarkable has happened so far and the global warming is continuing unabated. This however does not mean that no attention has been paid or no action is taken to combat the problem of climate change. The climate change has indeed been taken up as a serious challenge, at least, since the Earth Summit, 1992 and continuous efforts have been going on. But the prospects of majority of climate change strategies and actions encounter blocks difficult to surmount leaving them at cross roads. She presents her views on the emerging technologies in the context of climate change. The major problem is the scientific uncertainty about their environmental safety. From the legal perspective, the challenge is the lack of provision or incompatibility with existing law or exposure to conflicting laws. She argues that the major challenge in this regard is the resistance of the developed states to respect their commitments for Technology Transfer. The reasons for reluctance to share technology are not merely political alone but extend to the economic prospects of trade in technology.

Saligram Bhatt presents insight in the current perspectives on environmental law. He summarizes major issues of concern to national and international society in the field of environmental law. His chapter attempts to provide detail of humankind's response to challenges faced by global society. It also refers to the inspiration that humans have got by the global environment movement to shape a better social and economic world order.

Ali Mehdi presents a critique on the working of authorities established for protection and conservation of environment. The last quarter of the last century witnessed formulation and implementation of the policy and the laws focusing on environment for its protection and conservation. Mehdi notes that the apex court in India has shown its serious concern and contributed remarkably to activate the executive for execution of these laws. The court has come forward and by the process of interpretation and innovation under the caption "complete justice" laid down guidelines and directives to save the environment without impeding the process of development and hindering the progress of people. The chapter focuses on the functions of different agencies created under the various laws and the source and jurisdiction of the Central Empowered Committee and examines its contribution.

Vinod Shankar Mishra proffers some reflection on human rights to water. He notes that the Water Policy changes in the country reflect changes at the global

level. Globally, international water instruments such as the Dublin Statement and the Ministerial Declarations of the World Water Forum have sought to recast water as an “economic good” and a “human need,” which necessarily sidelines concerns embedded and inherent in perceptions of water as a “public good” or “social good,” and that of water as a “human right.” India is also under intense pressure to reform its water sector. In fact, the World Bank has been a key player in India, working behind the scenes in building consensus over Water Policy reform both at the centre and in states. He concludes that in the light of principles of distributive justice and equity, water should be made available to all sections of the society on the basis of need and not on the basis of financial considerations.

Sukanta K. Nanada in his paper rightly notes that the climate change has severely affected the human being and the whole world at large. It has affected the poor disproportionately and the subsistence farmers around the world have experienced an unpredictable season and social problems which are directly linked with the rising temperature. The alterations in the global climate would result in large-scale change in the ecosystem, disastrous disruption of livelihood, living conditions, human health and above all the economic activity. In the post-Rio Scenario, the richer countries responded unfavorably and inadequately to the concept of “common but differentiated responsibility.” He argues that now in the changed scenario both the developed and developing countries should come forward and share the “common but differentiated responsibility.”

Ajendra Srivastava examines the principle of sustainable development. As a concept it seeks to establish a close affinity between the policy goals of development and the environmental protection. The author argues that the principle needs more clarity to make it an action oriented principle. Further, the concomitant principles of sustainable development, such as polluter pays principle, precautionary approach principle, and environmental impact assessment need to be more vigorously adopted in policies and actions to achieve the objectives of sustainable development. The chapter also examines the differing views on the legal status of sustainable development. Srivastava argues that the view which considers that sustainable development is not a customary rule of international law ignores the modern approach regarding the formation of a custom in international law which relies more on *opinio juris* than state practice. The chapter shows that while international case law provides little insight into the issue whether sustainable development is a binding norm of international law, courts in India have explicitly accepted sustainable development as a principle of customary international law.

2 Part III: International Trade Law

International trade law defined broadly as a group of loosely connected rules, norms or customs governing trading or commercial activities between states has developed abreast with international trade and commerce. Information on the evolution of

international trade law is as scanty as information on the history of international trade itself.

The earliest form of body of rules and customs which we call international trade law was found in the rules and customs governing merchants and maritime matters, which was then called as maritime law. In Europe, the earliest maritime law emerged in the land adjoining the Mediterranean Sea, where sea-borne commerce was governed by trade usage or custom. Although there were regionally accepted codes for maritime and trade matters, the law varied from city to city and country to country. After the fifteenth and sixteenth centuries, sea-borne trade got internationalized, moving from Mediterranean Sea to Atlantic. This raised the demand for uniformity in international trade law and maritime law.

The development of International trade law may be divided into three stages. The first was the period of the medieval law merchant; the second was the incorporation of the medieval law merchant into the national systems of law in seventeenth to nineteenth centuries, and the third period is the contemporary phase which began after the Second World War. The development of international trade law in the nineteenth century was characterized by an extensive use of bilateral treaties. In the twentieth century and specially, after the second World War, bilateral treaties became an essential way to define the trade relationship between various countries. Many erstwhile colonies obtained independence. These countries started governing relationships in accordance with the principles of the United Nations Charter. The new world order established on the UN Charter forces countries to treat each other equally and reciprocally.

The General Agreement on Tariffs and Trade (GATT) took effect in 1948 and served as a forum for trade negotiations whereby every signatory country could enjoy the concessions of every other signatory (otherwise known as most-favored nation status). Membership in the GATT not only brought the United States into the multilateral trade regime but also provided a vehicle to rebuild the post war economies of Europe and Japan. The Uruguay Round achieved the most fundamental reform of global trade rules since the creation of the GATT. The Round established the World Trade Organization (WTO), extended international trade rules beyond goods to include intellectual property rights and trade in services, and greatly improved procedures for countries to resolve disputes over international trade. The WTO rules propose to encourage the creation of stable and predictable trading system, which consists of fair and transparent trade rules for all the participants.

The most important of the new issues that were brought to the table in the Uruguay Round had not made their way into either the Havana Charter or GATT. One was agriculture, a topic that was isolated from GATT in the 1950s and was the subject of failed negotiations in the Kennedy Round (1962–1967). Negotiators reincorporated agriculture into the system in the Uruguay Round, with countries making commitments affecting not only market access but also their production and export subsidies. The other significant additions in the Uruguay Round concerned services and intellectual property rights, with the General Agreement on Trade in Services (GATS) bringing a vast area of economic activity within the jurisdiction of

the WTO and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) making a large body of existing international law enforceable within the WTO dispute settlement system.¹⁹

At the Uruguay Round, developed nations (the US, in particular), under pressure from their pharmaceutical corporate lobby, proposed to introduce a uniformly strong IPR regime on all nations as part of a multilateral trading agreement through the TRIPs agreement. This was in spite of the fact that a strong intellectual property right (IPR) goes against the core philosophy of the WTO's principle of promoting competition and free trade. Moreover, there is now a large body of theoretical and empirical literature, firmly establishing that IPR regime must be endogenously determined within the economy, depending on the technological learning and capability levels of the country in question. Exogenous imposition of a strong IPR regime may severely hinder the process of technological catch up. Ironically, there is historical evidence to suggest that the developed world has had the flexibility to adopt an appropriate IPR regime during their process of development and technological learning according to the needs and priorities. Countries like Switzerland, Germany, Japan, and Italy did not adopt a strong product patent regime for a long time.²⁰

According to the theory of comparative advantage, the underlying economic model of WTO, each country should produce what it can do best, and trade that good with the products other countries are able to produce best, with the profit from exports, countries can buy goods that they cannot reasonably produce themselves. This increases trade and promotes the economic performance of all member states, which eventually raises the standard of living and ensures full employment and the growth of real income.²¹

The rules of the WTO aim at the reduction of trade barriers. Besides periodic tariff negotiations to lower tariffs, any other barriers to trade, such as quotas or import and export restrictions are prohibited.²² National trade regulations have to comply with GATT principles. The core principle is the principle of non-discrimination, which is provided in all WTO agreements. According to the principle of Most Favoured Nations Treatment, goods from different countries must be accorded the same treatment at the borders, when entering the country. The GATT also contains rules to avoid disguised trade restrictions, i.e., national rules, non-discrimination on the surface which constitutes a de-facto discrimination of foreign products.²³ The most important examples of these are technical standards

¹⁹Craig Van Grasstek, "The History and Future of World Trade Organisation", *WTO Publications*, 2013, at 48.

²⁰Amit Shovon Ray and Sabyasachi Saha, "India at the WTO: Evolving Priorities, Unaltered Paradigm", 2(2) *BJIR*, Marília, 2013, pp. 244–271.

²¹Jackson J.H., *The World Trading System: Law and Policy of International Economic Relations* (Cambridge University Press, 1977) at 14.

²²The General Agreement on Tariff and Trade, Article XI.

²³Gudrun Monika Zagel, "WTO & Human Rights: Examining Linkages and Suggesting Convergence", 2(2) *VDJ*, 2005, at 10.

and sanitary standards, which have to comply with the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The principle of non-discrimination applies to “like products” meaning products with the same properties, nature and quality, function or end-use in the market. The determination of “likeness” between domestic and imported products turns on the existence of a competitive relationship between these products in the marketplace.²⁴ Panel Reports and the Appellate Body have concluded that the assessment if or not such competitive relationship exists can only be made on a case-by-case basis involving an “unavoidable element of individual, discretionary judgment.” Relevant criteria employed in this assessment include (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers’ perceptions and behavior in respect of these products; and (iv) the tariff classification of the products.²⁵

The WTO establishes a framework for trade policies. Five principles are of particular importance in understanding both the pre-1994 GATT and the WTO

- (a) **Non-discrimination:** It has two major components first, Most favoured nation treatment (MFN) Rule and second, the National Treatment Rule. Both are embedded in the main WTO rules on goods, services, and intellectual property, but their precise scope and nature differ across the areas.²⁶ Article 1 of GATT has established the benchmark of a very broadly worded unconditional MFN obligation with respect to trade in goods. The number of challenging MFN issues is on the rise, particularly with reference to the application of the concept to the new subject of trade in services and trade-related intellectual property matters. It is not always entirely clear that the MFN concept as applied to goods will easily transfer to services or intellectual property.²⁷ MFN means grant someone a special favor and you have to do the same for all the other WTO members.

National treatment means that imported and locally produced goods should be treated equally and was introduced to tackle non-tariff barriers to trade. National treatment requires that foreign goods once they have satisfied whatever border measures are applied, be treated no less favorably in terms of internal taxation than like or directly competitive domestically produced goods.²⁸ National treatment ensures that liberalization commitments are not

²⁴European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body of 12 March, 2001, WT/DS135/AB/R, para. 87–99 (European Communities—Asbestos).

²⁵European Communities—Asbestos, *Id.*, para. 101.

²⁶Rameshwar Rai and Dinesh Kumar Jha, *Encyclopedia of World Economy*, Vol. 5 Crescent Publishing Corporation (New Delhi), 2011, at 261.

²⁷Jackson, John H., *The World Trading System: Law and Policy of International Economic Relations*, (Satyam Books, New Delhi, First Indian Reprint, 2012) at 157.

²⁸Supra note 22, Article III.

diluted through the imposition of domestic taxes and similar measures. The requirement that foreign products be treated no less favorably than competing domestically produced products gives foreign suppliers greater certainty regarding the regulatory environment in which they must operate.²⁹

- (b) **Reciprocity:** It is the fundamental element of the negotiation principle. It reflects both a desire to limit the scope for free trading that may arise because of the MFN rule and a desire to obtain payment for trade liberalization in the form of better access to foreign markets.³⁰
- (c) **Binding and Enforceable Commitments:** Liberalization commitment and agreements to abide by certain rules of the game have little value if they cannot be enforced.³¹ If a country perceives that actions taken by another government have the effect of nullifying or impairing negotiated market access commitments or the disciplines of the WTO it may bring this situation to the attention of the government involved and ask that the policy be changed. The complaining country can invoke the WTO dispute settlement procedure.
- (d) **Transparency:** The world becomes a darker, less certain, and less stable place when information is sparse or poorly distributed among interested parties. This is why transparency is a key governing principle of the WTO. Members have an obligation to pursue a transparent approach in their dealings. Policies should not be a secret. Procedural aspects of their application and decisions taken in pursuance of their objectives should not be secrets either.³² It is a legal obligation embodied in Article X of the GATT and Article III of the GATS.
- (e) **Safety Values:** The GATT provides for some exceptions which allow states to deviate from the WTO principles in areas to pursue specifically defined political interests. The possibilities are limited. The reason for the narrow scope of possible exceptions is that member states often try to justify protectionist measures with the need to protect non economic concerns. Article XX of GATT is the general exception clause which lists specific public policy reasons that justify the deviation of GATT principles.

Perhaps the most tangible contribution of the WTO is to be seen in its Dispute Settlement Unit (DSU). It has brought the rule of law to international trade. It is correct to say that the DSU of the WTO is a jewel in the crown of the WTO trading system. Yet the WTO dispute settlement machinery is far from perfect. The main flaws in DSU appear to be (i) contradiction that exists between transparency, participation, and the prompt settlement of disputes; (ii) non-existence of integrated

²⁹Hoekman Bernard and Susan Prowse, *The Political Economy of the World Trading System* (Oxford University Press, New Delhi, 2001) at 42.

³⁰*Id.*, at 43.

³¹Rameshwar Rai, *Supra* note 26, at 262.

³²“*The Future of Trade: The Challenges of Convergence*”, Report of the Panel on Defining the Future of Trade convened by WTO Director-General Pascal Lamy, 24th April, 2013, at 29, available at: http://www.wto.org/english/thewto_e/dg_e/dft_panel_e/future_of_trade_report_e.pdf. [accessed on November 12, 2013].

mechanism for the application of Panel and Appellate Body decisions; (iii) provisions for least developed countries (LDCs) in the DSU are too general to promote effective enforcement; and (iv) due to its strict rule based system the dispute settlement body's functions have been limited.

The WTO faces two sets of Legal challenges. First concerns its ability to fulfill the core task of bringing trade within the rule of law—an area in which GATT made a good but incomplete starts. A related problem may be to strike a balance between the legislative (Negotiations) and judicial (Litigation) function of the institution. The second challenge comes from the conflict that may arise between trade law and other area of theory and jurisprudence. One of the most serious problems in the multilateral trading system is the growing divergence between the interests and the influence of leading countries in that system. The willingness and ability of the countries to shoulder the burden of the system remain uncertain.³³ The political challenges stems directly from the economic issues. Economic and political powers are more widely distributed in the WTO period than was the case in the GATT period and the configuration of power in this system may be less conducive to multilateral liberalization than was the case in the old days of top down leadership.

It is true that the GATT and the WTO have not done all that they could for developing countries. But then there is really no alternative to multilateral trade and the WTO, the institution that represents it. It is generally acknowledged that despite its shortcomings the WTO is a unique forum to frame and interpret rules aimed at enhancing of the benefits of multilateral trade. It is for this reason that despite painful slow pace of negotiations on key issues after the Hongkong Ministerial meets of the WTO, all members decided to continue with the Doha Round.

It is argued that the Doha Round has been deadlocked since the collapse of intense negotiations till the middle of 2008. Since then, most of the major economies are facing financial and economic crises, and it is one of the major reasons for slow progress of concluding it.³⁴ One of the major reasons for the stalemate is an underlying lack of political will among some WTO members. But, in the Ministerial Conference, held in Geneva in December 2011, the WTO members reiterated their faith in the Doha Round and identified the need to fully explore different negotiating approaches with principles of inclusiveness and transparency. Additionally, at the 2012 G-20 Meeting in *Los Cabos*, the G-20 leaders also reiterated that they "stand by the Doha Development Agenda (DDA) mandate" and

³³Van Grasstek Craig, "*The History and Future of the World Trading Organisation*", Geneva WTO Publication, 2013, at 28, available at: www.wto.org/english/res_e/booksp_e/historywto_e.pdf. [accessed on November 12, 2013].

³⁴Bipul Chatterjee and Archana Jatkar, "Unlocking the Doha Impasse Imperative of a Balanced Bali Package", Briefing Paper No. 07/2013, CUTS International, at 1, available at: http://www.cuts-citee.org/pdf/Briefing_Paper13-Unlocking_the_Doha_Impasse_Imperative_of_a_Balanced_Bali_Package.pdf. [accessed on November 12, 2013].

that “fresh, credible approaches to furthering negotiations” were necessary to achieve success.³⁵

It is believed that the exogenous circumstances have contributed to the current impasse. Many believed that there was still a possibility that the WTO members will be able to reach an agreement on specific issues at the 9th Ministerial Conference in Bali in December 2013.³⁶ There are three possible areas of convergence that were taken up at the Bali meeting. These are: agriculture,³⁷ trade facilitation³⁸, and LDC issues.³⁹ It provides analyses of geo-political and geo-economic situations within which the WTO members need to navigate in order to arrive at a deal.

The developed countries had offered as part of the Bali package a “Peace Clause,” providing temporary respite for no more than few years from legal challenge at the WTO for the National Food Security Act (NFSA) breaching the *de minimis* support levels as decreed in the 1994 Uruguay Round agreement.⁴⁰ Given the WTO’s history of missing deadlines, it was an imperative that members come up with concrete actions to bridge the existing gaps on issues included in the Bali Package. Trade Ministers of 159 members of WTO, managed to reach an agreement in the wee hours of December 6. The fact that an agreement was possible at all is seen to be a significant achievement in relation to the issues on which consensus was reached. This is because the WTO and the Doha Round in particular, needed a booster shot as it were to retain their relevance. A revived WTO is good for all countries. Its success in years to come will depend on how the more intractable parts of Doha round are taken care of. The Bali Declaration has major implications for India and other developing countries. It was rightly believed that at the Bali

³⁵Ibid.

³⁶Ibid.

³⁷Agriculture is one of the most contentious issues in the 9th Ministerial Conference. There were two proposals submitted by the G-20 and G-33 groups of countries. The G-20 proposal deals with administering tariff rate quotas in agricultural trade. It looks at the way quotas for lower duty volumes allocated among importers and G-33 proposal concerns the issues of public stockholding for domestic food security.

³⁸Trade facilitation is considered as not only a major booster to the global economy but is also one of the major substantive issues that have made considerable progress in the Doha Round of negotiations. Over the years, several proposals have been made which are under revision. These are reflected in the latest draft of the negotiating text. Some of the topics covered are as follows: Improving the availability of information for traders, Establishing advance rulings on tariff classification and applicable duties to expedite customs clearance, Introducing pre-arrival clearance to allow goods to be released immediately upon arrival, Enhancing transparency in customs rulings and administrative procedures, Improving coordination among border agencies, Developing a uniform administration of trade regulations etc.

³⁹LDC-specific issues are the third area identified for the Bali Ministerial Conference and include 28 proposals agreed upon at the Cancun Ministerial Conference in 2003 which are aimed at strengthening special and differential treatment provisions pertaining to LDCs in various WTO agreements.

⁴⁰“Crisis Time for India (Again) at the WTO”, A Correspondent, XLVIII (43) *Economic & Political Weekly*, October 26, 2013, at 32.

Ministerial Conference, the U.S. will use a trump card to have its way with India and other emerging markets: food security legislation of developing countries and the related issue of trade distorting subsidy. On the pretext of allowing India's food security law to exist alongside its commitments to the WTO, the U.S. has wrested an in-principle agreement on the issue of trade facilitation. In other words, India has agreed to greater market access for western companies in order to ensure the survival of the Food Security Act. Of the two main issues—food security and trade facilitation—on which the agreement was reached, the former concerns Indian and other developing countries, which need to subsidies food for poor, while the latter is significant for developed and developing countries. The U.S. Suggestion for a sunset clause of four years was not acceptable to India. A final deal was struck to have an interim agreement until a more permanent arrangement was worked out.⁴¹

The possibility of likely erosion of confidence has been deferred because of the Bali outcome. The distrust may not has only happened among the global trade and development community at large but also among some WTO members, particularly the poorer ones as it is believed that they have much more to gain from a rules-based multilateral trading system. This is also reflected in a recent WTO report titled “The Future of Trade: The Challenges of Convergence,” 2013, which, among others, recommends that WTO members need to explore ways in which preferential trade agreements (PTAs) and its basic principles could increasingly converge with the multilateral system. In order to break impasse, a critical evaluation of today's geo-political and geo-economic situation is the need of the hour.⁴²

Part III of the book brings to fore the discussion on the contemporary issues in International trade law. In this part, the first essay on “Globalization, International Human Rights Law And Current Economic Crisis” is authored by B.C. Nirmal. He traces the origin of the current wave of “globalization” which according to him began to engulf the world economy first as a result of liberalization of trade in the developing countries under the leadership of the International Monetary Fund in terms of Structural Adjustment Programme and then because of the necessary impetus being provided by tariff reduction negotiations under several rounds of the General Agreement on Tariffs and Trade. He notes that the Globalization movements became a powerful force in international economic relations only when the World Trade Organization was established under the 1994 Marrakesh Agreement. The accelerating pace of globalization process today not only owes its origins in the rules-based multinational trading system created under the WTO regime but continues to depend on the WTO and the other major agents of globalization for its sustenance, vigor, vitality, and strength. Although World Bank, International Monetary Fund, multinational corporations, and investment firms are also the other agents of globalization, it is the WTO which has provided an institutional forum and normative tools for the acceleration of the globalization process. He suggests that in today's globalized world, influence of the powerful advanced economics on

⁴¹C.R.L. Narasimhan, “The Real Winner at Bali”, *The Hindu*, December, 16 2013.

⁴²Supra note 34 at 5.

multilateral institutions has played a part in determining policies which favor the nations in the advanced regions. It is therefore not a surprise to witness the failure of free markets as a hallmark of globalization to end unemployment and poverty. According to him the legal protection of “human rights” at international, regional, and national levels cannot remain unaffected by these negative developments because rights and freedoms set forth in the Universal Declaration of Human Rights, 1948 and other human rights treaties and covenants require for their realization an enabling and conducive social and international order. It therefore becomes necessary that the impact of globalization on human rights is re-assessed and re-examined. As part of this exercise, the chapter examines the meaning, definition, and forms of globalization and challenges it poses with regard to protection of human rights.

Sudhir Kochhar in his chapter provides an overview of national and international perspectives of IPR laws with a focus on some *sui generis* options. According to Kochhar many of the WTO agreements and/or provisions thereof may have conflicting perspective and varying national interests. TRIPs includes general principles, substantive norms for the protection of various forms of IPR, obligations with respect to domestic enforcement, and dispute settlement, which should be uniformly applicable as baseline for IPR protection in various jurisdictions of the WTO member countries. However, there are several facets particularly in the TRIPs Article 27, which can be severally interpreted and differentially enforced for patenting in agriculture field. He also presents the overall relationship between TRIPs and Convention on Biological Diversity (CBD) and reviews the opinion of various countries in relation to resolution of conflict between above documents. Some developing country members including Brazil and India were in favor of some international action in relation to the patent system, which may ensure/enhance the mutual supportiveness of the two agreements. Whereas members like African group, Latin America, etc., were in favor of TRIPs amendment to resolve its inherent conflict with CBD. He notes that the globalization process has thrown open opportunities for active contribution of agricultural scientists and technologists in the areas of research, education, and extension. Agricultural research has so far been carried out through the public support. In future, public-private partnerships for carrying out research in the areas of mutual convenience, however, will become more and more relevant and important.

Tham Siew Yean, Nik Ahmad Kamal Nik Mahmood, and Rokiah Alavi focus on three main aspects of the impact of liberalization of higher education services within the context of private providers. First, they assess the impact of trade agreements on the Malaysian market and domestic private education providers. Second, they assess the impact on Malaysian private education exporters in terms of market access in partner countries. Finally, the potential impact of the Draft on Disciplines on Domestic Regulations that are being negotiated in the GATS on the Malaysian domestic regulations in the higher education has been evaluated. They offer policy suggestions to improve the competitiveness, awareness, and equity balance. They note that Free Trade Agreements (FTAs) are gaining increasing popularity as trade policy instruments, especially in East Asia. The number of

concluded FTAs in Asia as a group increased from only 3 in 2000 to 54 in 2009, while 40 of these agreements are currently in effect, the other 78 FTAs are currently under negotiations or proposed. The essay provides insights in the context of the recent development in GATS that would affect the future of higher education, which is the negotiations on domestic regulation and norms that is taking place in the Doha Round. In the Uruguay Round, member countries did not reach a consensus in some areas in services agreement. These include Domestic Regulations (Article VI) and Norms (Article X, XIII and XV). Hence, members were called to develop disciplines on domestic regulations in the Hong Kong Ministerial Meeting in 2005.

S.K. Verma presents an overview of WTO and the regulation of international trade law. WTO aims at the free trade by lowering the trade barriers. In the context of Doha negotiations, she argues that the difficulties in the negotiations are encountered because of the complex nature of talks, with a broad array of subjects, and widely differing interests, even within countries. To this is added the key principle of “consensus,” that is, decisions are taken by consensus, which means everyone has to be persuaded before any deal can be struck (rule of “single undertaking”). The agreement arrived on each of the issues forms officially part of the Doha round of negotiations and accepted as part of the “single undertaking” in which all Doha round subjects form part of a single package, with “nothing agreed until everything is agreed.” Verma points out that when the Doha Round was launched, Ministers placed development at its centre but after the protracted negotiations spanning over a period of more than 11 years, goals of the Doha Round are nowhere in sight. In the meantime, there has been continued impasse in the Doha round of negotiations since 2005. With its ambitious agenda and procedural hurdles, it is difficult to foresee any successful conclusion of the Round in the near future.

Olaolu S. Opadere presents the Nigerian perspective on the specific issue of collective management of copyright in his work “The Complexities of Nigeria’s Copyright (Collective Management Organizations) regulations, 2007.” Collective management is an important tool to the maximization of copyright, which is an arm of Intellectual Property Rights. Many advanced economies have and are still exploiting the economic advantage offered by copyright, when properly managed. It is in pursuance of a desire for this advantage *inter alia*, in order to enhance her economic development, that Section 39(7) of the Nigerian Copyright Act further empowers the Nigerian Copyright Commission (NCC) to make regulations specifying the conditions necessary to give effect to the purposes of the relevant sections of the Act. Consequently, this led to the emergence of Copyright (Collective Management Organization) Regulations, 2007. Opadere critically evaluates the Regulations, being one of Nigeria’s efforts at maximizing the benefits of Copyright, via the instrumentality of collective management, as evident in the successful efforts of some countries. Meanwhile, owing to apparent lacunae and irregularities in the Regulations, it has become a major concern whether the desired objectives of the Regulations can be achieved, without first taking cognizance of, and addressing the irregularities. He notes that in this age and time the collective management

organizations (CMOs) be allowed to function without the unnecessary fetters around them, overtly or covertly, as suggested by the various depictions in the Regulations. He advocated that with the vastness of the Nigerian copyright industry, multiplicity of CMOs would do more good than harm.

A. Lakshminath and K. Sita Manikyam in their essay “Intellectual Property Rights: National and International Perspectives,” present an overview of intellectual property rights. Starting from conceptual basis they at the outset note that Intellectual Property Right (IPR) is in the process of constant development. As technology in all fields of human activities is developing exponentially, the field of IP is also expanding correspondingly. As per the requirement of scientific and technological progress, new items are getting added to the ambit of IPRs by extending and expanding the scope of its protection. Bio patents, software copyright, plant variety protections are to name a few to denote the contemporary developments in the field of IPR. Technological advancements and social evolutions necessitate constant re-evaluation of IPR system. Authors reflect on the issues of use of IP as a tool to advance development strategy, concerns surrounding the issues of IPR for developing countries, relevance of intellectual property for sustainable development and to the achievement of agreed international development goals, and whether the least developed countries have the capability to formulate their negotiating positions and become well-informed negotiating partners. In relation to patent and public health they point out that patents are not the only factor that play important role in determining access to drugs but other factors, such as infrastructure and professional support also play significant role. The chapter brings to fore the discussion on recent scientific developments including Stem cell research, Information Technologies, Traditional knowledge (TK) and Biotechnology and IPRs. Authors note that TRIPs, which was the result of seven years long and arduous negotiations, is regarded as the most effective international instrument providing for the formal legal regime on IPR. They also note that while TRIPs agreement lays down in detail the kinds of IPR entitled for protection under the umbrella of TRIPs, it conveniently excludes the traditional knowledge from the list of subject matters qualified for IPR protection. This non-inclusion of TK took place in the agreement even when it extended protection for micro-organisms and micro-biological processes.

T. Vidya Kumari writing on “The Changing Contours in the Regime of Copyrights in India,” states at the outset that the expansive legal terrain of copyrights is mired in controversies and complexities on the recognition and enforcement of rights granted therein. The ambit of this category of Intellectual Property has always been open ended. The essay presents the status of broadcasters in the context of Copyright Act, 1957 and details the changing dimensions of broadcaster’s rights in the light of 2012 Amendment of the Act.

Karna B. Thapa presents the Nepalese perspective on challenges of effective implementation of copyright law. Nepal entered into relations with various countries after the political change of 1950 and came under influence of different legal systems. Prior to 1950 Nepal had relations only with British India and thus, the laws of Nepal were influenced by the common law system. Even after 1950, the Indian

influence on laws of Nepal can be seen. In the changed context and to meet the needs of the time Nepal initiated the process of enacting laws including: the Copyright Act, 1965 and the Patent, Trademark and Design Act, 1965. As the law made at that time was insufficient to deal with modern legal complexities, the new Copyright Act was brought in 2002 in tune with other international legal provisions. Thapa notes that even after the enactment of Copyright Law, problems related to the copyright are common. The law has neither been made familiar to the concerned stakeholder nor properly implemented. Thapa details the reasons for poor implementation in Nepal viz. lack of awareness on copyright, tendency of using the work without taking permission, the absence of control of piracy and infringement of copyright, lack of knowledge about the copyright even on the part of implementing agencies, lack of separate policy on copyright, adjudication of copyright related dispute by ordinary court, and lack of clear cut provision on compensation to copyright owner.

The main aim of copyright is dissemination of knowledge or information to the public. In this context M. Sakthivel focuses on the issue of accommodating the concept of “communication to individual” within the context of “communication to public” in copyright law. Author argues that digital transmissions, i.e., technological advancements and the market or economic factor associated with that have the potential to alter the concept of “communication to the public” into “individual communication.” Sakthivel points out that the growth of law has been mostly because of external pressure in the form of technological pressure. The changing dimension of the scope of communication right is also the result of emergence of new technology.

Alternate Dispute Resolution (ADR) and Intellectual Property Right (IPR) form the subject matter of the essay written by Rajnish Kumar Singh. At the outset he points out that the increasing importance of intellectual property assets and the territorial nature of intellectual property (IP) rights clubbed with the growing importance of contracts between content creators and users compel us to assess the state of IP dispute mechanism in place. Author suggests that high costs and long delays involved in litigation have made it a less preferred option. The transnational nature of disputes also adds to the troubles of the litigants. It may also be argued that keeping in view the technicalities of science and technology involved in modern disputes, courts may not be properly equipped to provide quick and effective remedies. These factors have all fostered the growth of extrajudicial dispute settlement procedures. In this context the author examines the applicability and utility of ADR in general and arbitration in particular for resolution of IP disputes. His discussion indicates that the use of arbitration for IP dispute resolution is facing obstacles. The growth of these two laws have been mutually exclusive and that may be one of the reasons for not mentioning one in the other except in certain very few provisions in laws of country like India. It seems simple for the disputes covered in contracts in which an arbitration agreement has been incorporated, to be arbitrated. The problem seems to emerge for non-contractual disputes.

V.K. Pathak presents a description of the issues surrounding the doctrine of “Exhaustion of Rights.” There is a debate going on the limits on this doctrine.

The controversy arises when the legitimate goods are placed on the market by the IPR owner. These goods are not counterfeit but since it is not clear that they are infringing goods, they are sometimes called “grey goods” or “parallel imports.” According to him, parallel imports involve fundamental issues of international trade and intellectual property policy. He argues that the different approaches adopted by different countries create confusion in relation to the regulation of parallel trade. It is established that only international exhaustion are consistent with WTO principles and should therefore be imposed on WTO Member countries.

In the chapter entitled “Transborder Reputation and Trademark Law in India”, Adesh Kumar suggests that trademark law is constantly evolving in an attempt to meet the challenges of the rapidly developing Indian economy. The courts in India have recognized and protected transborder or spill over reputation of international trademarks of overseas companies in various cases. Kumar argues that even though the courts have laid down various guidelines to protect the interests of the traders and combat the incessant menace of passing off prevalent in the market today, with the prevailing situation in the Indian market and the deep rooted plagiarism cultivated in the society there seems to have been a dilution in the implementation of these parameters.

3 Part IV: Information Technology Law

There has always been a rift between technology and law. The pace of technological growth has always posed challenges for law. It has become a daunting task for the law makers and enforcers to keep pace with technology and to regulate the problems produced by the technology. Cyberspace is such technology driven virtual space which defies the rules and regulation of the physical world.

Cyberspace represents the new medium of electronic communication which is fast outmoding, or even replacing, more traditional methods of communication.⁴³ It comprises information technology (IT) networks, computer resources, and all the fixed and mobile devices connected to the global Internet.⁴⁴ This cyberspace has become one of the most enviable destination for varied activities including entertainment, traveling, hospitality, health care, and different forms of communications including e-mail, chatting, video chatting, etc. Now it becomes the centre of all forms of economic activities as well as activities of strategic importance for the country including defence services and all other government services under the head of e-governance. This dependency on the cyberspace makes it most vulnerable place for various forms of cyber-attacks. Cyber-attacks are defined as “deliberate

⁴³Rebecca Bryant, Minerva, “What Kind of Space is Cyberspace?”, 5 *An Internet Journal of Philosophy*, 2001, pp. 138–155.

⁴⁴Kamlesh Bajaj, “The Cybersecurity Agenda: Mobilizing for International Action”, *East West Institute*, 2010, at 1 available at: http://www.ewi.info/system/files/Bajaj_Web.pdf. [accessed on November 16, 2013].

actions to alter, disrupt, deceive, degrade, or destroy computer systems or networks or the information and/or programs resident in or transiting these systems or networks.”⁴⁵ These cyber-attacks compelled the world community to give substantial emphasis on the security of cyber infrastructure all around the globe. The genesis of these cyber-attacks/threats lies in the characteristics of the cyberspace, which make it soft target for the cyber offenders.

The unique features of the internet, particularly, its borderless expanse, rapid technological advancements, anonymity, speed of communication, and data transfer have posed multiple challenges to legislators of different countries who strive to adapt their existing laws for application in cyberspace or develop new laws to govern the virtual world or to vindicate the critical infrastructure from various form of cyber-attacks.⁴⁶ These unique features of internet technology defied the fundamental notions of law. The major issues in the cyber world which are still in the state of flux are: determination of jurisdiction, emergence of new form of cyber crimes, intellectual property infringements, tax law, e-commerce, electronic evidence, privacy and online contracts, etc. One of the greatest lacuna for resolving these issues are the absence of comprehensive law anywhere in the world. The problem is further aggravated due to disproportional growth ratio of Internet and cyber law.⁴⁷

Information communication technology revolution changed the paper-based transaction to the paperless transaction and which finally become responsible for the exponential growth of e-commerce. The growing importance of e-commerce and its contribution to the world economy make it one of the most prolific developments of the last few decades. But at the same time hurdles arises in the form of cyber offences which create annoyance to the smooth functioning of e-commerce and in some cases cause huge economic losses. These acts justify the need for a uniform legislation or model so as to regulate the e-commerce transactions all around the globe. In the wake of above-said reasons The Model Law on Electronic Commerce was framed by the United Nations Commission on International Trade Law in the year 1996.⁴⁸ The decision by the United Nations Commission on International Trade Law (UNCITRAL) to formulate model legislation on electronic commerce was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information was inadequate or outdated because it did not contemplate the use of electronic

⁴⁵Herbert S. Lin, “Offensive Cyber Operations and the Use of Force”, 4(63) *Journal of National Security Law & Policy*, 2010, at 63.

⁴⁶Karnika Seth, “Evolving Strategies for The Enforcement of Cyber laws”, High Level Consultation Meeting for formulation of a National Policy and Action plan for Enforcement of Cyber Law, New Delhi on 31, Jan 2010, at 1.

⁴⁷V. Shiva Kumar, “Cyber Crime—Prevention & Detection”, available at: www.indiancybersecurity.com/police_channel.../cyber_crime.pdf at 2, [accessed on November 16, 2013].

⁴⁸Resolution A/RE S/51/162, dated January 30 1997, the United Nations General Assembly adopted this set of Model Law.

commerce.⁴⁹ The model law permits States to adapt their own domestic legislation to regulate the e-commerce. The model law does not specifically deny the existence of paper-based transaction rather it gives due recognition to the paper less transactions also. While adopting the model by any state three things must be taken into account, i.e., Functional Equivalence, Technological Neutrality, and Party Autonomy.⁵⁰ India also drafted its IT law by following above said requirements. The IT Act, 2000 came into effect from October 17, 2000 on the lines of the UNCITRAL Model Law. It was amended through the Information Technology (Amendment) Act, 2008. The basic purpose of these amendments is to combat new emerging cyber threats.

The last decade witnessed some new types of cyber-attacks/threats, e.g., Stuxnet, Botnets, Emergence of Hacktivism, WikiLeaks, Ransomware,⁵¹ and Spear Phishing Attacks⁵², etc. It is rightly said that Cybercrime is the deadliest epidemic confronting our planet in this millennium.⁵³ This statement shows the gravity of these offences and inadequacy of IT laws. The internet matrix has disturbed the legal ambience whereas the legal provisions are chasing the cyber-criminal who is resorting to newest technological *modus operandi* every now and then.⁵⁴

The international element in the commission of cyber offences creates new problems and challenges for the administration of justice. Therefore, it is the need of the hour to strengthen the international cooperation among the countries to check the phenomenal growth of the internet crimes. On November 23, 2001 the Budapest Convention on Cyber Crime was organized by the members. It was realized by the world community that it is necessary to counter actions directed against the confidentiality and integrity of computer system, networks and computer data as well as the misuse of such system networks and data by providing for the criminalization of such conduct, and the adoption of mechanism sufficient for effectively combating such offences by facilitating their detection, investigation, and prosecution both at the domestic and international levels and by providing arrangements for fast and reliable international cooperation. By and large, the convention acknowledges the fact that international cooperation in respect of prohibition, investigation,

⁴⁹C.M. Abhilash, "E-Commerce Law in Developing Countries: An Indian Perspective", 11(3) *Information & Communication Technology Law*, 2002.

⁵⁰The United Nations Convention on the Use of Electronic Communications in International Contracts, 2007, Preamble and Article 3.

⁵¹Ransomware is a form of malicious software that infects the computer which restricts access to the computer system that it infects and asks for money.

⁵²Phishing attack is an e-mail masquerading as a message from a trusted source (bank, Credit Card Company, e-commerce retailer, and so on). The message typically asks to verify account information immediately with the threat of a negative consequence if the information is not verified. Phishing attack is an online method used by scam artists to steal money and personal information.

⁵³Vijay Kumar and Shrikrushna Chowbe, "An Introduction to Cyber Crime: General Considerations" available at: <http://ssrn.com/abstract=1766234>. [accessed on November 20, 2013].

⁵⁴Talat Fatima, *Cyber Crimes* (Eastern Book Company, Lucknow, 2011) at 52.

extradition, and mutual legal assistance are necessary for fighting the menace of cyber crimes.

Rampant growth of e-commerce presents new challenges for the business world regarding collection of cross-border taxes, liabilities of contracting parties in the case of on line contracts and cases of intellectual property infringement in the form of cybersquatting, typo squatting, and digital piracy, etc. Assessment of tax in this changed environment is very difficult and it has defied the fundamental notions of taxing statutes. Issues of transfer pricing, double taxation, and permanent establishment which are very much prevalent in the paper based transaction come up with a new form of complexities. For assessment of taxes we follow the source-based taxation or residence based taxation and for the same we need to define the permanent establishment or business connection. It became cumbersome task to define permanent establishment for websites, web servers, and Internet service provider (ISPs). Although Organization for Economic Co-operation and Development (OECD) guidelines are there, the issue remains unresolved. The Technical Advisory Groups (TAG)⁵⁵ of OECD had done some meaningful work in the field of e-taxation.

It can be said that we have to prepare ourselves for cyber warfare and try to develop an adequate technical and legal mechanism. For this we need to develop a comprehensive Cyber Security Infrastructure which is capable of parting the digital divide. Information and communication technologies (ICTs) today have impacts on virtually every aspect of society and every corner of the world in information or digital age fostering commerce, improving education and health care, and facilitating communications among all stakeholders.⁵⁶

Part IV of the book contains chapters on the emerging issues of information technology law. The first essay on “Information Asset as Property—A Legal Perspective” has been authored by Sonny Zulhuda and Abdul Haseeb Ansari. They present the Malaysian perspective on the applicability of property concept to the information. The way people today store, reformulate, and process information—and eventually generate revenues out of it—have marked the shift from a raw material-based and labor-intensive business to the information and knowledge-based entrepreneurship. Information is increasingly becoming a commodity not only just a business process tool. Zulhuda and Ansari make an attempt to revisit the notion of information as an asset and analyze how law responds to this development. Their chapter reconfirms that information is the new big thing in today’s business that is characterized by globalization, digitization, and deregulation of rules. They further describe and analyze how the law—notably at the judges’ hands—contributes to the strengthening of this notion by tendency to recognize the proprietary status of information—something that is not so well established.

⁵⁵Aparna Viswanathan, *Cyber Law National and International Perspectives* (Lexis Nexis, Butterworth’s Wadhwa, Nagpur, 2012) pp. 305–306.

⁵⁶Ajmal Edappagath, “Cyber-Laws and Enforcement”, available at: <http://www.iimahd.ernetin/egov/ifip/dec2004/dec2004.pdf>. [accessed on November 20, 2013].

Authors argue that the law is in a changing mode and becoming a more information age-friendly.

Tek Bahadur Ghimire writing on “Data Protection Law and Policy Factor impact on Public Trust in e-Government System in Developing Countries” notices that information communication technology (ICT) application in public service sector has been inevitable at this digital age. E-Government is a comprehensive ICT tool to provide not only time and cost-effective service, but also assures omnipresence of the government and ubiquitous monitoring process for global people. Tek Bahadur maintains that maintaining digital privacy and personal data protection scheme in e-government law is important to foster public trust. Trust worthy digital information system in public sector has a chain effect to make e-government system successful. Reliable digital information system encourages people to adopt the e-service. Higher ratio of adoption itself is stakeholders’ participation which empowers government to implement e-government system. Citizen’s participation has significance for the success of e-government system. Government as e-government system manager should think about specific form of e-government law before launching the e-government project. Author argues that digital privacy and personal data management scheme is one of the inevitable elements to enhance citizen’s participation.

Akhilendra Kumar Pandey presents views on the relationship between globalization, communication, and obscenity from feminist perspective. He notes that the behavior of the members of society is governed by simulations and not by reality. There has been a revolution in communication and information technology. These technologies have facilitated many things in positive direction but at the same time it has reduced considerably the barriers in depicting sexual exploitation of women by showing obscene images—pornography and other forms of commercial sex, through various modes of communication. Pandey argues that the law on the point appears to be inadequate. While the existing law gives an impression to protect some interests of the young children leaving adult women aside, it also does not address the issue as to how obscenity can be effectively regulated without providing for prohibition on the production of such obscene material.

Taxation of E-commerce is another area of Information Technology Law which presents challenges for the legislators in most of the countries. Writing on the issue Dinesh Kumar Srivastava notes that there are no separate provisions in the income tax laws that deal exclusively with Electronic Commerce. Therefore, where relevant, the present provisions of the Income tax laws and their interpretations would be applied to E-Commerce transactions. In his extensive chapter Srivastava explains the Factors playing Roles in E-Commerce and Permanent Establishment in E-Commerce. He refers to OECD as well as in the UN Model Conventions on the subject. He raises the issues relating to various forms of contract, transaction of Intellectual property and online transmission of books etc. He suggests that concept of Permanent Establishment cannot be applied to E-Commerce. All attempts of applying the concept of Permanent Establishment to E-commerce are bound to fail. On the other hand, non-taxation of the incomes on sale of the goods through electronic commerce may incur a great revenue loss to the country in which they are

sold which would have taxed had the transactions been carried out through Permanent Establishment.

Today information technology touches every aspect of human life, irrespective of location on the globe. Everyone's daily activities are affected in form, content and time by the computer. Businesses, governments and individuals all receive the benefits of this information revolution. With increased availability of e-resources and affordability of internet, has come a new form of criminal activity that takes advantage of electronic resources, namely computer crime and computer fraud. Currently, these new forms of crime pose a new and lasting challenge to law enforcement agencies at all levels. Subhash Chandra Singh in his write up "High-Tech and Computer Crimes: Global Challenges, Global Responses" deal with many of these challenges. He presents a summary of the computer crime and the challenges it poses to the law enforcement agencies. Singh attempts to evaluate the international and national strategies to combat computer-related crimes in the present digital age.

Laxmi Narayan Dhungel proffers some reflections on Nepalese Information Technology law. He argues that Nepal needs to base its national information technology strategy on a much greater consideration of local cultural and social issues. The government has a major role to play if the country wants to stand in the information arena. Dhungel at the outset notes that in Nepal, especially in the public sector, technologies come as a package with development projects from various donor agencies. These projects have primarily focused their activities on the development and delivery of specific outcomes within specific time frames. Little or no provision has been made for building the technological capability of the recipient organizations to sustain the use of the new technology beyond the lives of the projects. In Nepal the policy instruments and the relevant agencies are failing to regulate and ensure the technology acquisition from both internal and external sources in a way to maximize the benefits. He argues that there is a great need for clear legal provisions and academic research in the field of Information Technology in developing countries like Nepal.

Balram Prasad Raut presents the Nepalese view on the specific issue of Cyber Crime. He notes that in Nepal, the concept of cyber law is still in rudimentary stage and the debate on possible improvements and revision is missing. The Electronic Transaction Act (ETA) was enacted to regulate the cyber crime, but it appears to be deficient in many respects. Simultaneous existence of many laws on the issue is creating troubles for enactment. Therefore, an umbrella legislation is needed to regulate the issue of cyber crime. Further, the investigating agency, the Nepal Police, public prosecutor as well as the judges need to be trained to ensure proper application of the law.

Ravindra Wakade in his chapter "Legislation for Domain Name Registration: A Requirement in Globalization" makes the observation that with globalization and E-commerce, the disputes relating to the domain name registration are on rise. They are tackled internationally and nationally through legislations and policies which are developed mainly on basis of arbitral proceeding. He explains the policies and legislations adopted with special focus on Uniform Dispute Resolution Policy

(UDRP), American Law and Indian policy. He rightly concludes that the use of trademark law for the concept of domain name has not proved to be sufficient. As sale of popular domain names have been proved to be a very profitable business, the cybersquatting and other domain related offences are bound to be experienced by Indian commerce.

Wakade proposes that it would be wiser to learn from global trends and be prepared for it.

The exponential growth of the Internet enables individuals and groups to share ideas, experiences and information in many newer ways. Golak Prasad Sahoo attempts to answer a range of pressing questions in the special context of cyber obscenity. He also presents a brief account of the history of Information Technology Law in India. He suggests that new technologies not only create material progress and human welfare but they may cause serious risks and actual damages both to nature and human beings. Unless, there is a concrete step to make the Internet a safer and more reliable environment through the discipline and control of law, it might destroy its very creator, the man.

4 Part V: Legal Education

Justice delivery is dependent on the lawyers and judges in a society. To improve the standards of justice delivery in any country, it becomes crucial to oversee the way legal education is imparted. It is the responsibility of legal education to impart ideals of justice, equality and fairness in the society, and train bright young minds to become lawyers and judges for tomorrow.⁵⁷

Sir Henry Maine wrote that legal studies were the highest priority in Rome because “Law was the doorway to wealth, to fame, to status, to the Council Chamber, way to the very throne itself.” Obviously, he is speaking in terms of the utility of the knowledge of law to the individual for success in life.⁵⁸ Unfortunately, in this respect, our syllabus of course falls sort of desired levels. The result is that, as a means to economic security and prosperity, our young men prefer Engineering, Technology, Medicine, Science, or even Education and Library Science courses. And it is only when they have failed to pursue these courses that they contact to the study of law.⁵⁹

Legal Education of highest standards revitalizes administration of justice which at present is passing through a unique phase of being faced with peculiar

⁵⁷“Study on legal education”, Research Foundation for Governance in India, available at: www.rfgindia.org/publications/Legal%20education%20-%20report.pdf. [accessed on November 14, 2013].

⁵⁸Anandjee, “Deans”: Report Response to the Banaras Scheme”, 1(I) *The Banaras Law Journal*, 1965, pp. 1–32 at 10.

⁵⁹Ibid.

challenges.⁶⁰ Docket explosion, falling standards in professional excellence, inadequate funds are but a few such challenges. The almost successful efforts by foreign legal firms to set up their offices are sure to send signals which cannot be ignored. Already there is a rumor that international arbitration are dominated by foreign lawyers and in such cases, Indian Lawyers play secondary role. The situation can be avoided, and can be prevented by changing and concentrating on policy options in all legal fields. But, the beginning should be made at law colleges.⁶¹

Law Schools are not merely concerned with systematic preparation of extant laws and practices or even with their critical evaluation but, also laboratories for training students to study human motivation in a complex society and ever-changing socio-political-economic needs of the community, and to assess and recommend a body of law which, while finalizing human behavior in a manner best subserving interest of the community, would continually augment the preferred values of the society and raise the society to ever-increasing heights.⁶²

Legal education reform is taking place around the globe to make it more responsive than ever before to the legal needs of the community-national as well as global and the learning needs of students to become professionally competent to play their role in our increasingly interdependent world. The focus of legal education reform in other parts of the world is on integration of cross-border and international dimensions of practice with existing curriculum, with greater emphasis on problem-solving, negotiation and transnational practices in the curriculum and balancing it with the traditional curricular focus on litigation, use of new technology and a greater use of clinical legal education for bridging the existing gaps between theory and practice of law.⁶³ Although the ongoing processes of economic globalization have received a serious blow in the wake of the recent global financial meltdown, changes brought about by globalization in law and in the legal profession require law schools to bring global perspective to legal education and impart such skills to students as are necessary for them to join the legal profession in the increased transnationalized legal service market.⁶⁴

The need for a lawyer who is well equipped to provide legal services beyond national frontiers has given the impetus necessary for the global law school movement.⁶⁵ A global law school may be described as “a centre of thoughts, where a broader range of opinion is found than in local law schools, with a multinational

⁶⁰Justice A.R. Lakshmanan, “Legal Education in India”, 34 *The Banaras Law Journal*, 2005, pp. 1–5, at 1.

⁶¹Ibid.

⁶²Deans’ Report, *Supra* note 58, at 15.

⁶³B.C. Nirmal, “Legal Education in India: Problems and Challenges”, 20 *IIUMLJ*, 2012, pp. 139–167, at 142.

⁶⁴Ibid.

⁶⁵Alexander H. E. Morawaand Xialolu Zhang, “Transnationalization of Legal Education: A Swiss (and Comparative) Perspective”, 58 *Penn State International Law Review*, 2008, pp. 811–830, at 811.

faculty and students' body, and a programme to produce lawyers capable of success worldwide.⁶⁶

Legal education in a country, whether developed or developing, operates in a particular socio-economic and political context and aims to fulfill the needs of society by producing law graduates who are competent enough to take up a wide range of responsibilities as legal professionals. In the beginning legal education aimed at producing lawyers for the courts, and its content was then dictated by the demand of legal profession. But, today legal education has to meet not only the requirements of the Bar but also of the new needs of trade, commerce, and industry in the context of growing internationalization of the legal profession.⁶⁷

Like every other institution in Indian society, higher education in general and legal education in particular is in a continuing process of far-reaching changes in organization, management, content, and delivery. The basic factor in this transformation is the constitutional mandate to build a social order based on democracy, human rights, and rule of law securing to all of its citizens justice, liberty, equality, and dignity.⁶⁸

The National Knowledge Commission, while deliberating on the issues related to knowledge has made a modest attempt in this regard when it, after recognizing legal education as "an important constituent of professional education" stated thus⁶⁹:

The vision of legal education is to provide justice oriented education essential to realization of values enshrined in the constitution of India. In keeping with this vision, legal education must aim at preparing legal professional who will play decisive role, not only as advocates practicing in the court, but also as academics, legislators, judges, policy makers, public officials, civil society activists as well as legal counsels in the private sector, maintaining the highest standard of professional ethics and a spirit of public service. Legal education should also prepare professionals equipped to meet the new challenges and dimensions of internationalization, where the nature and organization of law and legal practice are undergoing a paradigm shift. Further, there is need for original and path-breaking legal research to create new knowledge and ideas that will meet these challenges in a manner responsive to the needs of the country and the ideals and goals of our Constitution.

Globalization-induced changes in the international relation have altered the nature of legal profession today and as legal profession is closely tied up with legal education, time has come for our legal educators and the regulatory authorities concerned to move forward and restructure legal education so that our law graduates can also successfully compete in the emerging global market of transnational legal service.⁷⁰

⁶⁶*Id.*, at 817.

⁶⁷B.C. Nirmal, *Supra* note 63, at 147.

⁶⁸N.R. Madhava Menon, "The Transformation of Indian Legal Education", *The Harvard Law School Program on the Legal Profession*, 2012, at 5.

⁶⁹The National Knowledge Commission, Compilation of Recommendations on Education, October 15, 2007, available at: <http://www.knowledgecommission.gov.in/recommendations/>.

⁷⁰B.C. Nirmal, *Supra* note 63, at 167.

It is important to note that the importance of quality legal education was felt and realized in India also which is evident from some of the reforms which started in early 1960s. The establishment of a model national law school in India was not an isolated event. Instead, the suggestion for such a standard-setting institution can be traced to consultants with the Ford Foundation, an institution that made considerable investments to try to improve Indian legal education. The Banaras Hindu University was preferred by the foundation because of the presence of Prof. Anandjee, who was the dean of the faculty of law there. Von Mehren was impressed by the efforts of Anandjee, who was the first in post-independence India to introduce the 3-year LL. B. program. The other universities, such as Delhi University, also required a bachelor's degree as a pre-legal qualification. But theirs was a 2-year law program. To ensure a rigorous law program like those in American law schools, the foundation thought it should insist on the 3-year law program. Von Mehren firmly believed that Anandjee had revamped the LL.B. program at Banaras Hindu University, making it more rigorous and, therefore, best-suited to implement Ford's reform vision for legal education in India.⁷¹ The attempt to further reform the area is visible in the form of works of Prof. Upendra Baxi at University of Delhi and further the establishment of National Law Universities.

In the foregoing background, the last part of the book contains scholarly contributions on the various aspects of legal education and law teaching. Robert P. Barnidge, Jr. in his essay presents the British approach on research excellence in legal education. He refers to The Research Excellence Framework 2014 for the purpose. Barnidge raises a very relevant question as to how does one assess research excellence in legal education. He notes that research can influence the law and social change in ugly and unpleasant ways, and one can certainly imagine that establishment forces would have a vested interest in demonizing threats to their authority.

A. Lakshminath observes that the age of positive jurisprudence having passed we are now persuaded by the intellectually liberating potential of inter-disciplinarity. He notes that globalization does not merely mean addition or inclusion of new subjects in the curriculum. While that is, no doubt, an important matter, the broader issue is to prepare the legal profession to handle the challenges of globalization and internationalization. This obviously goes far beyond preparing graduates only for practice at the bar or for the subordinate judiciary. According to him scholars point out that the essence of modern research is interdisciplinary, which is enriched through assimilation of knowledge from diverse sources but degenerates through transplantation or innovation of external models which have little authenticity and relevance to the new environment.

⁷¹Arthur Taylor von Mehren, "Law and Legal Education in India: Some Observations", 78 *Harv. L. Rev.* 1180, 1965. Cited from Lovely Dasgupta, "Reforming Indian Legal Education: Linking Research and Teaching", 59(3) *Journal of Legal Education*, 2010, at 437.

Olaolu S. Opadere highlights the problems and challenges bedeviling law teachers in developing societies. He notes that Law teachers in tertiary institutions face enormous and multifaceted problems and challenges, particularly, in developing countries. These comprise of poor infrastructure and/or overstretched facilities, unstable academic calendar, power/electricity failure, etc., which are ubiquitous. Other nagging and/or emerging challenges include: reconciling current realities with some perceived obsolete laws/case law, by students; teaching the visually impaired alongside the unimpaired, without particular consideration or empathy; incidence of overcrowded classes, which has virtually obliterated tutorials and the opportunity of “student engagement” in the course of learning; unstable/unpredictable academic calendar, which has perpetuated “surface learning” approach as against “deep learning” approach; etc. He concludes that the problems and challenges should, actually, not be as perennial and defiant as they seem to have become; if there was commitment on the part of the law schools.

Bhavani Prasad Panda and Minati Panda in their essay “Legal Education and Research in India: The Changes and the Challenges” write that the evolution of the legal profession in the context of globalization presents a very exciting research frontier and opens newer opportunities for legal education and research institutions. According to them the ambit of “legal education and research” got distinctively widened and entered into a larger orbit of knowledge domain, in the post WTO era. Authors identify the vexing issues with regard to legal education and suggest methods for raising the level of legal education to global standards. They conclude that India needs to accelerate its knowledge base *inter alia* to build a legal education grid. It needs to fit into the level-playing paradigms of operation enriched with quality men, material and skills to keep afloat with the changing world order. The pedagogy in legal education has to be infused with at least six relatively discrete ideologies or discourses: doctrinalism; vocationalism; corporatism; liberalism; pedagogicalism; and radicalism.

Writing on “Legal Education in Nepal: Recent Reform and Need for Change”, Bibek Kumar Paudel presents Nepalese view on the objectives of legal education. He describes the history of legal education in Nepal. He notes that Tribhuvan University, Faculty of Law, has introduced a new 5-year B. A. LL.B. course since 2010 in order to make legal education compatible with changed national and international context. The course aims to enrich law students with comprehensive theoretical and practical knowledge in indigenous as well as foreign legal traditions, lawyering skills, and research to meet the challenges of the age. He concludes that Students passing out without an adequate training in comparative law may not be able to contribute significantly to a discussion relating to major problems of modern society. He argues for raising the voice in favor of uniform curriculum of the legal education at SAARC region, which will help a lawyer to come out from watertight compartment of domestic law, to remove national biasness, to make the law global and to reform national legal system.

Jayadev Pati brings to discussion a different but a very important dimension of legal education. He argues that though the traditional legal education was confined to class room teaching only with the aid of text books, journals, periodicals and

reported cases, time has now come to groom the students keeping in view the need of legal profession. The traditional practice of theoretical study basing on non-clinical and para-clinical methods in the field of legal education will not be so effective. The law students need to be imparted knowledge and training on clinical legal education in this era of science and technology. Clinical legal education requires students to take an active part in the learning process. They assume a degree of control over their own education and they see law in its real-life context.

Legal Education has its unique importance in the justice delivery system of any country. In this context Ritu Gupta discusses the issues and challenges in the landscape of legal pedagogy in India. She evaluates the recent statement of the Bar Council of India before Parliamentary Standing Committee reviewing the Higher Education and Research Bill, 2011 along with National Knowledge Commission's note on the issue. She notes that a paradigm shift in the legal education system is inevitable to overcome the upcoming challenges. The false dichotomy of "theory versus practice" should be put to rest to face the real challenges.

Prasant Kumar Swain and Shaikh Sahanwaz Islam assess the status of legal education with the help of a specific example of Odisha. They argue for establishment of a single regulatory body having experience in legal education and profession. They advocate for establishment of a Legal education committee to explore the hindrance in imparting quality legal education and suggest remedies in this context. It is only the concerted effort from all stakeholders that can help increase the efficiency of legal education to take the challenge of globalization at par with international standards.

Arun Kumar Singh makes an attempt to compare the traditional law schools with the National law schools. He argues that India is the country with huge population and everyone cannot afford costly education, especially from National Law Schools. Thus a system should be developed so as to make quality legal education available and affordable to common people.

In her paper "Donut-Style of Teaching Law, the Multi-disciplinary Subject", Rimali Batra remarks that lawyering means problem-solving. She discusses the nature of the subject "Law" and provides the scope and limitations of the subject. She produces evidence from past to show that Law is multi-disciplinary. Rimali concludes that the foremost idea is to inculcate a thought-process among students of law that they have a wider interface with the society and therefore learning law in statue books is a very narrow a view of the subject. There is a need to revisit what we teach and how we teach and to reform it.

S. Sivakumar, in his paper "Legal Education in India: A Contemporary Discourse" point out the deficiencies in the way law schools are imparting education. He presents very crucial observations on the pattern of teaching and research in law schools. His concern about lack of sincere and committed teachers is not of place. Sivakumar provides a detailed account of the state of legal education as it existed during British period and after the independence of India.

This book represents perceptions of various Asian, African and European countries in reflecting on the various facets of contemporary issues in International Law. A common concern visible in the book is that the changing dimensions of

trade law, environmental law and information technology law is posing and likely to pose serious threats for the world particularly the developing countries. It is believed that a technology based solution may not alone be sufficient to solve the technological problems. Harmonization of laws, cooperation between developed and developing nations and development of technologically neutral liability principles are the bases on which we may device solutions for the issues identified in this book.

Part I

**Environment, Trade, Information
Technology and Legal Education:
Overview**

Chapter 2

Legal Education

Ranjana Prakash Desai

The Banaras Hindu University established by Pandit Madan Mohan Malviya, the great son of India occupies a prominent place in the history of Indian freedom struggle. It is the alma mater of several great leaders who have played a key role in helping India realize its dream of independence. Situated in this holy city of Banaras, this great centre of learning draws to its portal students from all over the country in their quest for knowledge. My brother Justice B.S. Chauhan is a distinguished alumni of this University. I deem it a great honour to have been invited here today to participate in this international conference organized by the Law School of Banaras Hindu University.

From the topics suggested by the organizers, I choose ‘Legal Education’ for my address, because it has a distinct and important place in the field of education. I thought I should share my views with this August audience on the branch of education to which I owe my modest achievement.

There was a time when ambition of most children was to take up medicine and become doctors. Some wanted to become engineers, some chose to become mathematicians. Some hoped to be scientists. Law was never their favourite though it is the lawyers like Sardar Patel, Mahatma Gandhi, Motilal Nehru, and Jawaharlal Nehru who were at the steering wheel of the freedom movement, who gave it the right direction and won freedom for us. Even the constituent assembly was dominated by lawyers, the prominent among them being Dr. B.R. Ambedkar, the architect of that monumental work—the Constitution of India.

Though, earlier the legal profession did not attract the cream of students, the scenario has changed now. With globalization, trade and commerce has crossed barriers. Internet has linked people and practically erased the boundaries. Level of basic education has increased. People are becoming more and more aware of their

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rights not merely property rights but fundamental rights or human rights. Legal education has now assumed great importance. Its importance can be measured by the number of bright students who now choose law above another disciplines. Independent India adopted democratic way of life. It chose democratic form of government, which rests on rule of law; Legal education is the essential requirement of rule of law.

The British rule had its impact on the Indian legal system. It was based on English Legal system which had then evolved on the basis of common law. A number of Commissions were appointed to examine the problems of legal education which it was felt has to be in tune with changing times. It is interesting to note what the Gajendragadkar Committee stated about legal profession and legal education and I quote

The legal profession is a comprehensive concept which includes not merely those who take up private practice before judicial forums but includes law teaching, law research, and administration in different branches where law plays a role, as also those commercial and industrial employments and all other key points where policy decisions based on knowledge are constantly made. The aims of legal education would be to make the students of law good lawyers who have absorbed and masterminded the theory of law, its philosophy, its function and its role in a democratic society.

Legal education could be classified broadly into two categories-Liberal and Professional. Liberal legal education is that which imparts basic understanding of the law and justice system for the healthy growth of democracy and for strengthening the rule of law. Professional legal education prepares students to act as lawyers and judges. It involves taking training in the art of advocacy. It teaches lawyers to file or defend cases and prepare legal documents. It teaches lawyers to become judges and adjudicate disputes. It prepares law students to become good law teachers. But, legal profession like medical profession is a noble profession. A lawyer with his forensic skill must successfully put across the case of his client and like any other professional prosper economically but, he has higher duties towards the society for which the legal education trains him.

Law has a dynamic role to play as an instrument of progress. Legal education teaches how to use law for the betterment of society. The survival of democracy and rule of law is possible only if the legal education inspires lawyers to use law as a tool for their preservation. In the freedom struggle of several nations, lawyers have played a stellar role. At times the legal education has made lawyers successfully overcome the inadequacies of law and reach out to people—see how judges and lawyers have worked in sync and expanded the scope of Article 21 of the Constitution of India to give relief to people by protecting their human rights. Article 21 guarantees life and personal liberty of a person. By the commendable efforts and ingenuity of lawyers and judges, Article 21 now encompasses right to reputation, right to livelihood, right to pollution free water and air, right to a reasonable residence, right to food, decent environment, right to privacy, right to health and medical aid of workers, right against handcuffing, right to speedy trial and host of other rights. Article 21 is now made to cover practically every aspect of human life and protect people from arbitrary State action. This is one of the many

achievements of legal education. We now need international Trade law experts, cyber-law experts, patent law experts. The present-day lawyer has wider field to travel than the lawyers of the past. While one can chose to practice in braches of law, there is also specialization. One can be taxation expert, corporate law expert. One can choose only criminal law. Unfortunately crime rate has risen tremendously. But the purpose of legal education is not just to be well versed with legal theories, professional skills and techniques. Its purpose is to realize its capacity to protect fundamental rights of people, to protect democratic institutions, to ensure that the State does not deviate from the path of democracy and adheres to the fundamental principles of State policy. Legal education must train the lawyers to rise above pettiness at crucial times and to work for the cause of justice. Lawyers dominate politics. Experience has shown that they can effectively run Governments. Lawyers can be good policy makers. Legal education should prepare lawyers for holding key positions in national life. It would be appropriate to quote what that great American Judge Justice Fortas (as he was then) said about the role of lawyers and I quote

A lawyer is not merely a craftsman – or even an artist. He has a special role in our society. He is a professional, specially ordained to perform at the crisis time of the life of other people; and almost daily, to make moral judgments of great sensitivity. He is the principal laboratory worker in the mixing of governmental prescriptions. His is an important hand at the wheel of our economy because, as lawyer, he has a profoundly important voice in business transactions. And, of course, he is the custodian of the flaming sword of individual and personal liberty, as well as of the public order.

Mr. Justice Ivan Rand of Canada described the lawyers' role aptly and I quote

Two general conceptions have been held of what the product of a life spent in the profession of law should be. One is that of craftsman, skilled in the use of law, technician, adviser, legislator, in the sense of prescribing the terms of future action, and as advocate; conceiving a legal order to be largely a self-contained body of established rules, precepts and principles, standing somewhat apart, without organic roots in the group life to which it is applied; an order to which human beings must more or less, like the victims of Procrustes, adapt themselves or be adapted".

The other conceives a lawyer as a member of a profession which has become part of the constitutional structure of the nation, a ministrant of justice, to whom law is a branch of government; whose equipment embraces the rules as well as the skills of the craft but in a setting of broad understanding of the social organization which gives rise to their nature and necessity; to whom the just government of human beings in society, in all its aspects, is a fundamental concern of men. He is of a class to which the community will look for much of its political and community leadership, and, in a democracy, for the organization of freedom and its cognate institutions, for the reconciliation of its conflicts, and for the vindication of government by law. In emergencies, he becomes the challenger of tyranny or despotic power in any form and barters his independence to no group or interest.

We have, in our country, seen what important role was played by lawyers in resisting emergency in 1975. It is their legal education that gave them strength to fearlessly stand up for the cause of personal liberty.

For lawyers to reach such high level of excellence they must have knowledge of all allied social sciences. They must have knowledge of economics, political science, sociology, and psychology. There is increasing interaction between technology and law. Some amount of knowledge of relevant technology is essential for modern lawyers. Since classics of law are in English despite the present move to conduct proceedings in trial courts in local languages, law students must be made proficient in English language. This is also necessary because the language of higher courts is English.

Unfortunately, there is mushrooming of number of private law colleges, some of which are in the business of education which is disturbing. What we need is a sincere effort to enrich and strengthen the legal education by studying and comparing it with the framework of legal education of other successful democracies. Earlier clinical or practical instruction was completely neglected. Fortunately, 5-year law course does include clinical or practical instruction but there is much scope for improvement. What Knowledge Commission said in 2009 is important and I quote

The curricula and syllabi must be based in a multidisciplinary body of social science and scientific knowledge. Curriculum development should include expanding the domain of optional courses, providing deeper understanding of professional ethics, modernizing clinic courses, mainstreaming legal aid programs and developing innovative pedagogic methods. Legal education must also be socially engaged and sensitize students to issues of social justice.

We need to have more National Law Schools, equipped with libraries and infrastructural facilities and law teachers with vision, who can translate Knowledge Commission's observations into reality.

One serious problem facing legal education is the paucity of good law teachers. While National Law Schools are blessed with good teachers some of the smaller colleges are not so fortunate. Attention must be focused on persuading law students to take to teaching and teaching law must be made more lucrative. Senior lawyers often go to National Law Schools for giving lectures. They should also visit smaller law schools. This is how a lawyer can repay the profession which has done so much for him.

The tremendous rise in crime against women prompts me to make a suggestion. I feel that legal education must now contain a separate subject entitled 'Laws Relating to Women and their Effective Implementation'. Justice Verma Commission's report begins with Mahatma Gandhi's quotation which reads thus

Women is the companion of man, gifted with equal mental capacities. She has the right to participate in the minutest details in the activities of man, and she has an equal right of freedom and liberty with him. She is entitled to a supreme place in her own sphere of activity as man is in his. This ought to be the natural condition of things and not as a result only of learning to read and write. By sheer force of a vicious custom, even the most ignorant and worthless men have been enjoying a superiority over woman which they do not deserve and ought not to have. Many of our movements stop half way because of the condition of our women.

Hardly anyone remembers these words of Mahatma Gandhi. Despite the exalted position given to women in our scriptures and despite the constitutional protection, crimes against women are increasing. Sensitization of lawyers, some of whom are going to be Judges, must begin in law schools. The change of mindset, of which we talk so much, can start from the law schools.

Mediation as a mode of alternative dispute resolution has now got a legal sanction. It is true that it is included as a subject in curriculum but more concentrated efforts need to be made to impress upon the students the value and need of mediation as a mode of alternative dispute resolution. The dockets of the courts are overflowing, because of the rise in population and skewed judge population ratio. Litigation is becoming more and more complex and expensive. Many a time, Judges are unable to fathom the undercurrents of a case. Sometimes, a litigant who has a good case may lose because he cannot afford to engage the services of a good lawyer. If the cases are settled through mediation both sides are happy and the Judges are relieved of the lingering unease that perhaps the truth was not properly unfolded before them and their judgment could be wrong.

In his speech on the occasion of centenary celebration of University College of Law, University of Calcutta, Shri Gopal Krishna Gandhi, The Governor of West Bengal quoted Abraham Lincoln's words which in my opinion are very important. Hence, I quote them

Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation. A worse man can scarcely be found than one who does this.

As aptly said by Abraham Lincoln there will be enough business for lawyers even if litigation is discouraged but litigation must be discouraged in the larger interest of people. Therefore, there is need to concentrate on this subject.

Finally, I must refer to one aspect which overrides everything else, i.e., professional ethics. There is a criticism that some lawyers are increasingly seen indulging in sharp practices. I must again turn to Abraham Lincoln's observation quoted by Mr. Gopal Krishna Gandhi in his speech. While talking to lawyers, Abraham Lincoln said in 1907

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confident and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer...

The situation has not improved but has worsened. Lincoln said that if you cannot be an honest lawyer, resolve to be honest without being a lawyer. I don't want to paint such a sorry picture of legal profession. If the legal education is of sterling quality, it will produce only honest lawyers. Honest and good lawyers should be a

rule and dishonest lawyer must be an aberration. It is the dedicated honest lawyers who worked tirelessly and won freedom for us. Legal profession is a glorious profession with high tradition. Lawyers are policy makers and social engineers. They are torchbearers of liberty, equality, fraternity and all the good values of life. But it must always be remembered that it is not just the knowledge of C.P.C., I.P.C., Cr.P.C. and Evidence Act which makes one a good lawyer. Inculcation of ethical and moral values, ability to rise above the client's brief at the crucial time and the desire to assist the court as an officer of the court in times of need is what makes a lawyer a good lawyer. Professional ethics must, therefore, receive greater attention in the curriculum of Legal Education because it is absolutely necessary for the lawyers to adopt the path of utmost rectitude. Reputation once lost can never be regained.

I owe a great deal to the legal education. I do not know whether as a lawyer or as a judge, I did justice to legal education which I received in Law College. Whether I have made good use of legal education in performance of my duty as a judge, is for others to say. But, I am sure that legal education has made me a good human being. Legal education widens your horizon. It sharpens your intellect. It makes your mind analytical. It sensitizes you towards the problems of others. We need to strengthen the legal education because, it is the legal education which is going to give this country, people who will hold key positions in social life, who will help the State take policy decisions at national and international level which are vital for maintenance of rule of law and the progress of democracy in India. I have no doubt that perfect legal education will give this country perfect lawyers who will work for the cause of justice and shape its destiny in future.

Before I close, I thank the organizers of this conference for having given me an opportunity to participate in this extremely well-organized conference.

Chapter 3

International Environment Law, Trade Law, Information Technology Law and Legal Education

S.P. Mehrotra

I thank you all for giving me this opportunity to be among you in this international Conference on topics of great contemporary relevance. Banaras Hindu University is among the top-ranking Universities in the country and is well known for its contributions in the academic field. This Conference assumes great significance as it is being organized on the occasion of 150th Anniversary of Pandit Madan Mohan Malviya, who was the founder of this internationally reputed temple of learning. Your law Faculty has been fortunate and privileged in having Mahamna Malviya Ji as its Dean for several years. Legal luminaries like Sir Ras Bihar Ghosh and Sir Tej Bahadur Sapru also adorned the office of Dean in your Law Faculty, which is indeed a matter of great privilege.

Coming to the theme of this Conference, you have chosen topics of wide amplitude which are of great relevance in modern times. Distinguished Speakers have addressed this Conference. I am confident that the deliberations of the Conference on these topics must have covered various aspects of each of the topics, and outcome of such deliberations must have been enriching and enlightening.

As the topics are of great importance, I cannot resist the temptation of briefly sharing a few thoughts. Adoption of concepts of Globalization and liberalization and rapid developments in various fields of science and technology are fast diluting the relevance of national boundaries and barriers. The world is fast coming closer and is becoming more intimate. There is growing desire among the nations to achieve development at a rapid rate within shortest possible time. The revolution in the field of Information Technology is fast changing the entire world scenario.

Based on the lecture delivered during the valedictory session of the International Conference on “International Environmental Law, Trade Law, Information Technology Law and Legal Education”, March 3, 2013.

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These phenomena have contributed to the growth of International Environmental Law, International Trade Law and Information Technology Law. These laws are intended to deal with problems and challenges which the world community is facing while pursuing the path of development. Legal Education must keep pace within these new phenomena.

Brief comments on the topics of the Conference will be pertinent. International Environmental Law is intended to overcome and check the problems being faced the world over on account of decline in environmental quality. In their desire to achieve the optimum economic growth and accumulate maximum material wealth, the nations, for a long time, have exploited natural resources indiscriminately and have polluted earth, sea, and air thoughtlessly. Nations have not realized for long that irreversible damage is being done to the environment and the human race itself would be the greatest sufferer.

The three effects on environment are not confined to any nation. The entire world community is affected. Problems of Depletion of Ozone Layer, Carbon Emissions, Green House Effect, etc. with their disastrous consequences like Global Warming and Climate Change have put the survival of human race in danger and have fortunately woken-up the international community from its indifference and slumber. The international community is fast realizing the gravity of the situation and the need to take urgent steps to preserve the environment.

In June, 1972, United Nations Conference on "Human Environment" was held in Stockholm, where the world community resolved to protect and enhance the environmental quality. Numerous International Treaties and other Agreements pertaining to the environment have been entered into to meet the global environmental challenges. These Treaties and Agreements seek to cover areas such as biodiversity, atmosphere, land, chemicals and hazardous wastes and oceans, seas, and water.

United Nations Organisation is making its effort so that the nations may cooperate in solving the problems of Global warming and Climate Change. Vienna Convention for the protection of the Ozone Layer was adopted on March 22, 1985. Montreal Protocol on Substances that Deplete the Ozone Layer was adopted on September 16, 1987 which was adjusted and amended on June 29, 1990. In June, 1992, United Nations Conference on "Environment and Development" was held in Rio de Janeiro, which is also known as the "Earth Summit". The Framework Convention on Climate Change was opened for signatures in Rio. In 1997, the Kyoto Protocol to the United Nations Framework Convention on Climate Change was concluded. In December, 2009, United Nations Climate Change Conference, commonly known as "the Copenhagen Summit" was held at Copenhagen, Denmark. Recently, about 200 Nations participated in the "United Nations Global Warming Talks" in Doha to settle the differences on fossil fuel emissions and climate aid so as to pave way to a new treaty by 2015. The pace at which the International Environment Law is developing is thus self-evident. The global norms laid down in various fields concerning environment need critical examination. There has to be a constant and continuing study of this fast developing field of International Environmental Law.

The next topic included in the theme of the Conference is the International Trade Law. During the pre-World War Second period, there was growth in protectionism in the matter of trade among the Nations. The General Agreement on Tariffs and Trade (GATT), 1947 led to reduction in the protectionism during post-World War II period.

As a result, trade increased manifold. However, in 1980s, there was re-emergence of protectionism in the matter of trade. In order to over-come this phenomenon and to increase the momentum of trade liberalization and trade growth, Uruguay Round of Negotiations began in 1986. These negotiations included "Trade-Related Aspects of Intellectual Property Rights" (TRIPs). The negotiations concluded in 1993 and became part of the World Trade Organization (WTO) Agreement signed in Marakesh in April, 1994. The WTO Agreement came into force on 1st January, 1995. TRIPs also became part of the WTO Agreement. The provisions laid down in these Agreements are intended to achieve the objectives of trade liberalization and trade growth. WTO provides a framework in order to regulate Trade in Goods, Trade in Services, Trade Related Intellectual Property, Agricultural Trade, Anti-dumping, Subsidies, Technical Standards, Textiles, Customs Valuation and Dispute Settlement. These Agreements have necessitated enactments of various Municipal Laws and amendments/modifications in the existing Municipal Laws.

These developments have led to tremendous growth in trade and commerce crossing the boundaries of Nations. There is growing interaction among the people throughout the world. There are joint ventures, mergers and takeovers of companies, inflow of foreign investments, goods and services, etc. Fresh challenges and problems are coming up on account of fast growing field of International Trade Law. There are problems concerning International Arbitration and Foreign Awards. Problems concerning International Taxation are also coming up. These problems are to be addressed and solved. I am certain that the delegates of the Conference must have discussed various aspects of International Trade Law and their implications for our country. Problems coming up in the field of International Trade Law and their solutions must have been touched upon by the distinguished speakers.

Third topic chosen by you is Information Technology Law. Fast developing field of Information Technology and Communication has revolutionized the entire world scenario. Internet has completely diluted the relevance of political boundaries and economic barriers. The people throughout the world have come closer together through ever-increasing means of connectivity. Internet has become source of information on almost all the subjects in the world. It has provided a unique medium for sharing and exchange of information. Free movement of goods and services using Internet as medium is fast increasing. Performance of jobs online and outsourcing of services are assuming new dimensions.

The field of information technology has been brought about by Computers, Internet, and Cyber Space. This technology has raised issues and problems hitherto unknown to jurisprudence. Fields of e-commerce, cyber crimes, the jurisdictional aspects pertaining to cyber-space and other related issues need to be appropriately regulated and critically appraised.

The General Assembly of the United Nations by Resolution dated January 30, 1997 has adopted Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law. For giving effect to the said Resolution and to promote efficient delivery of Government services by means of reliable electronic records, our Parliament has enacted the Information Technology Act, 2000.

The three topics noticed above, though appear to be distinct, are interrelated. Rapid growth in the field of Information Technology and E-commerce has contributed to the tremendous increase in Trade and Commerce which in its turn has raised problems concerning environment. Internet has also posed problems concerning intellectual property rights. Bhopal Gas Tragedy has shown how a Business Establishment can cause damage to environment resulting in untold miseries to human kind.

In order to resolve problems coming up in these fields, one must have clear understanding of Public International Law as well as Private International Law. Bhopal Gas case has seen the complexities of issues involved in such matter.

Legal Education in such a fast-changing world scenario has assumed great importance. During the last three decades, there has been growing concern to maintain the quality of Legal Education and to make it relevant to meet the challenges coming up in the modern World. New subjects have been introduced in the Law Course in the Universities. A great challenge before the Legal Education is to develop among the Law Students proper understanding of the Principles underlying the Constitutional Law and basic laws relating to Contract, Tort, Crime, Property, Family Laws, etc., while also teaching them the new subjects which urgently require attention in view of the changing world scenario. Constraints of time and capacity of students must be kept in mind while introducing new subjects. Quality of Legal Education should not suffer on account of quantum of Law Course.

Another aspect which needs attention is practical training for Law Students. To make Legal Education relevant, it is necessary that besides academic study, practical training should be given to the Law Students. To meet this requirement, Moot Courts have been introduced as a part of Law Course in the Universities. I am happy to learn that your Faculty has introduced the Clinical Legal Education and Legal Aid Programme to cater the need of the poor. These will provide the students an opportunity to interact with the clients and also the Advocates in relation to the cases reported to the Clinics. The students are bound to be benefited by such Clinics.

I am confident that the outcome of the Conference will be of great relevance not only from the academic point of view but will also help in the improvement of Legal Education as well as in assisting the Law Makers and Policy Makers in identifying various issues and problems which are to be addressed.

Even though it is valedictory session of the Conference, I hope that this is only beginning of fruitful discussions, which you may have at your future Conferences. I once again thank you for giving me this opportunity for addressing this gathering of eminent Jurists and Professors.

Chapter 4

Environmental Pollution and Its Control

R.S.R. Maurya

This International Conference has been organized to discuss the issues relating to international environmental, trade and information technology law. I must thank the organizers for selecting such burning topics for discussion which have deep concern with all the living creatures on the earth.

The surrounding atmospheres, which made it possible for living creatures to born and survive from generation to generation on the earth, is called environment. There is a deep relation and interaction between living creatures and environment. The living creatures totally depend on earth with air and water are the natural resources and organs of the environment. Plants and animals have interdependency on each other. Plants prepare its food with the help of natural resources and at the same time they produce food and oxygen for animals. The nature has created the entire environment in such a way that all the phenomena are regulated automatically.

The scientific and economic developments are causing great harm to environment. Unlimited extraction of the ground water and minerals is depleting the water level day by day. Deforestation of earth is reducing the production of oxygen very rapidly. The excess carbon emission in air creates air pollution and causing increase in the temperature of the planet leading to global warming. Producing large quantity of unsolvable waste has also emerged as a serious threat for mankind. It is important to note that the continuous degradation in the quality of environment is largely caused because of the developmental activities. The damages caused to the environment, in last about 60 years are probably more than the damages caused during the period before. The alarming situation needs immediate attention of all the stakeholders.

Based on the lecture delivered during the inaugural session of the International Conference on “International Environmental Law, Trade Law, Information Technology Law and Legal Education”, March 2, 2013.

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Environment is a valuable property gifted to us by the nature. Nature has entrusted the environment in over hands. Our generation is trustee and it is our duty to maintain and preserve it during our life time and pass it on to the future generation in the same condition.

The world has reached a higher level of growth in the twenty-first century. The key questions which often arise are as to whether economic growth can supersede the concern for environmental protection and whether sustainable development which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of humanity and future generations could be ignored in the garb of economic growth or compelling human necessity. The growth and development are terms without any content and without any linking to the substance of their end results. This inevitably leads to the conception of growth and development which sustains from one generation to the next in order to secure "our common future". In pursuit of development, focus has to be on sustainability of development and policies towards that end have to be earnestly formulated and sincerely observed. This is also a truth that, "conservation, always takes a back seat in times of economic stress". The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer.

In the international sphere, "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "Our Common Future". In 1991 the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called "Caring for the Earth" which is a strategy for sustainable living. Finally, the Earth Summit held in June 1992 at Rio witnessed the largest gathering of world leaders ever in the history deliberating and chalking out a blue-print for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non-binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution.

During the two decades from Stockholm to Rio, "sustainable development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". The report says that we have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalized by the international law jurists. It is now an accepted social principle that all human beings have a fundamental right to a healthy environment, commensurate with their

well-being, coupled with a corresponding duty of ensuring that resources are conserved and preserved in such a way that present as well as the future generations are entitled equally.

In 1982, the United Nations developed the World Charter for Nature in which it recognized the need to protect nature from further depletion due to human activity. They state the measures needed to be taken at all societal levels, from international right down to individual, to protect nature. They outline the need for sustainable use of natural resources and suggest that the protection of resources should be incorporated into the legal system at state and international level. To look at the importance of protecting natural resources further, the World Ethic of Sustainability, developed eight values for sustainability, to include the need to protect natural resources from depletion. In these documents, there have been many measures taken to protect natural resources, some of these ways include Conservation biology and Habitat Conservation.

Some of the salient principles of “Sustainable Development” as culled out from Brundtland Report and other international documents are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays Principle, Obligation to Assist and Cooperate, Eradication of Poverty and Financial assistance to the developing countries. “The Precautionary Principle” and “The Polluter Pays Principle” are essential features of “Sustainable Development”. Returning to the Stockholm Convention, a support for the notion of sustainability can be found as follows:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

Another legal doctrine that is relevant to this matter is the Doctrine of Public Trust. This doctrine is in existence from Roman times which means that the bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public uses for which they are adapted.

The principle of inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in Principles 1 and 2. In this context, the environment is viewed more as a resource base for the survival of the present and future generations.

Principle 1 Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations.

Principle 2 The natural resources of the earth, including the air, water, lands, flora and fauna, and especially representative samples of natural ecosystems, must be safeguarded for the benefit of the present and future generations through careful planning or management, as appropriate.

From the aforesaid it has become apparent that one must realize the difference between need and wastage in order to protect the natural resources from wastage. We have to protect the natural resources, i.e., water, minerals, forest, etc., it is not out of context to mention that we need to evolve policies to control our population, which is root of all the problems.

Part II

International Environmental Law

Chapter 5

Understanding Further Regulatory Needs of Components of Agrobiodiversity and Genetic Resources for Food and Agriculture for Sustainable Use

Sudhir Kochhar

1 Introduction

Twenty years down the line since the Earth Summit held in 1992, international community met again at Rio de Janeiro and reviewed the progress of time-bound commitments made under the United Nations Agenda for the twenty first century (Agenda 21). The Rio +20, focusing on seven pre-identified priority areas including the ‘Food security and sustainable agriculture’, observed that only some programmes are in place but funding is still lacking. Conservation and sustainable utilization of plant genetic resources for food and agriculture (PGRFA) is an important contributing factor in this priority area. Para 14.57 of Agenda 21 required that policies for in situ on-farm and ex situ conservation and sustainable use of PGRFA should be integrated into strategies for sustainable agriculture, and programmes to achieve this target should be implemented by nations by the turn of the century. In India, enactment of the Biological Diversity Act, 2002 and the establishment of the National Biodiversity Authority at Chennai for its implementation have been significant landmark steps to address the access and benefit sharing issues in harmony with the Convention on Biological Diversity, 1992 (CBD).

The CBD, however, did not address two key issues related to plant germ plasm management that were identified under the International Undertaking on Plant Genetic Resources for Food and Agriculture (IUPGR), and endorsed by the Food and Agriculture Organization of the United Nations (FAO) as per its Council Resolution Numbers 4/89 and 5/89. These issues involve, (i) ante dating the

Gratefully acknowledge Dr. S. Ayyappan, Secretary (DARE) and Director General, ICAR for the all possible opportunity and encouragement provided to me for pursuing my professional interest in the agrobiodiversity/PGR field.

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enforcement of national biodiversity laws with respect to the ex situ germplasm collections held as Designated Germplasm in the custody of the FAO and kept in the international gene banks prior to the enforcement of the CBD; and (ii) realization of farmers' rights with respect to access to germplasm and benefit sharing from its use. Although the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), 2001 has subsequently brought in the agreed provisions for these two outstanding issues yet their adoption in the national biodiversity laws and internalization in the local administrative actions could be pending. This chapter discusses some of these concerns with regard to the provisions in and implementation of the Indian biodiversity law.

2 Germplasm for Food Security and Sustainable Agriculture

There is imminent interdependence of countries and regions for meeting their food and agricultural requirements in a continuum. Future threats of climate change and genetic vulnerability call for facilitating a rational and more reasonable access to genetic resources for sustainable use of potential donors for specific adaptability of crop varieties and other traits. However, access to these resources for various uses would be affected by (i) their availability, which may be in the open/public or exclusive Intellectual Property Rights (IPRs) protected domains; and (ii) the regulatory framework determining the terms of access. Invariably, the regulations should allow easy flow of germplasm on simple terms for research and breeding use to allow development and use of varieties/hybrids of, at least, food and forage crops.

Biological species, both plants and animals, have been selectively domesticated, described and used as sources of food, well-being (nutraceuticals), health-care (medicines), clothing (fibers), shelter (timber), fodder, fuel, several other human necessities, and industrial products. Different focal areas across the globe have shown differential evolution and growing potential of various agrobioresources of crops and animals. Agro-biodiversity constitutes this unique sub-set of the overall biological diversity, and caters to the bioresources/genetic resource needs for evolving newer and more productive varieties and breeds of crops and animals.

Bioprospecting of various agro-bioresources leads to many innovative industrial applications of these resources. 'Law of commons' suggests that unless conscious efforts are made towards conservation of such bioresources the probability of their depletion through commercial exploitation remains high. Similarly, 'Law of anti-commons' suggests that if the use of genetic resources, which are used to develop new varieties/breeds of crops and animals to enhance food and agricultural production, is confined by the exclusive use of IPR then it may not be possible to harness their full potential towards food security and sustainable agriculture. Agro-biodiversity is also relevant and important to various other domains, for example, the ecological, social and economic domain. This also needs regulatory attention for conservation and

sustainable use of various components of agro-biodiversity. Thus, the understanding on agro-biodiversity within the overall biological diversity domain needs to be streamlined and enhanced, particularly in the context of regulating access, determining equitable benefit sharing, and promoting sustainable use of its components across the public and proprietary domains.

2.1 Agroecosystems

Natural ecosystems that prevailed in the areas displaced by agriculture would have continued to be store-houses for perennial resources like clean drinking water; or basis for recycling processes such as decomposition of wastes, cleaning of polluting air, etc. However, the agro-ecosystems have also continued to cater to some of the basic ecosystem services like provisioning of food and fodder in addition to meeting the other agriculture-based needs of the human population. Compared to the natural ecosystems, the agro-ecosystems may be weaker in rendering the corresponding regulating services, for example, climate and disease equilibriums or support services, for example, nutrient cycling. However, perpetual human intervention through agriculture has also led to new innovations and inventions that could reshape the agro-biodiversity over space and time. For example the support services for crop pollination have been built through identification and artificial rearing of the suitable bees, and similarly vermiculture and organic manuring has been applied to support soil and nutrient balance. Further, technology-led safeguards have been innovated, such as, population resilience through the release of pest resistant varieties and breeds, and sustainability through the maintenance of crop varietal diversity over space and time. Besides, release and cultivation of new aesthetic and sacred products foster recreational and spiritual benefits to the humankind. These innovations also enrich the agro-biodiversity over all.

Relevance and importance of agro-biodiversity may also be extended to the variety of farm animals, fish, and agriculturally important microorganisms, and of the ecosystems of which they form a part. The capacity of agro- and aquatic-ecosystems to maintain and increase their productivity, and to adapt to changing circumstances, is vital to the world food security. However, the scope of agro-biodiversity may be still larger and multi-dimensional, which needs to be further described.

2.2 Diversity of Crop and Farm Species

Out of an estimated 10–13 million (best estimates) species occurring on the Earth planet a meager 1.72 million biological species including 1.3 million animal species and 0.42 million plant species have been scientifically named. It has been also estimated that with the current strength of scientific infrastructure and rate of

species identification, about 550 more years may still be required to discover and describe the available biodiversity across the globe. At the same time, with the knowledge that many of the biological species are vulnerable or threatened, there is likelihood that some of these will be lost undescribed. Further, it is also estimated that in order to meet the routine needs for food, fibers, industrial, cultural and medicinal purposes, about 40,000–1,00,000 plant species have been discovered and used by human beings; out of which, 30,000 species were identified as edible. The number of species cultivated at one point of time or the other is around 7000; and among these, just over 150 species have been widely used for food.

Today, over 90% of the world's food energy need is met from merely 30 crop species. Intensive human intervention appears to have further narrowed down the major components of crop-biodiversity to just five major food staples, including three cereal crops (rice, wheat and maize), and two root and tuber crops (tapioca and potato). The three major cereals among these meet up to 60% of the world food requirement. Therefore, productivity enhancement in the food staples is vital to meet the needs of the ever-increasing population. Agricultural production and productivity requires a boost on the size and scale that has already been achieved in industry and services. Hence, an increased and more intensive human intervention in the components of agro-biodiversity over the time is imminent.

Like in crops, there is a long history of domestication and development of 40-plus livestock species, which has also contributed to the agro-biodiversity vis-à-vis food and agricultural production. The genetically diverse, regionally adapted livestock populations provide a greater range of options to meet the future challenges, including the climate change, emerging disease threats, new knowledge of human nutritional requirements, fluctuating market conditions or changing societal needs. Around ten domesticated species of birds, including chickens, ducks, geese, pigeons, quails, turkeys, etc., also provide source of food.

Approximately 236 species of fish, invertebrates and plants are farmed, and over 1000 species harvested from the world's capture fisheries according to the reviews by the Food and Agriculture Organization of the United Nations (FAO). Fish provide more than 2.6 billion people with at least 20% of their animal protein intake. About 90% of world aquaculture production and most of the world's capture fisheries production come from developing countries. The most important fish genetic resources, by species, for aquaculture are carps, catfishes, milkfish, salmon, tilapias, mussels, oysters and shrimps, as well as their wild relatives; for inland capture fisheries, these are carps, catfishes, characins, salmonids; tilapias and other cichlids; and for marine capture food fisheries, small and large pelagic fishes, reef fishes, sharks and other elasmobranchs, demersal fishes, and diadromous migratory fishes such as salmon and sturgeons. Important plant genetic resources for farmed aquatic plants include those for marine seaweeds and freshwater macrophytes.

2.3 Intra-specific Agrobiodiversity

Conscious selections made by farmers and their communities over generations, particularly in the centres of origin and diversity of various agrobioresources have resulted into variety of specifically adapted cultivars and landraces crops and, similarly, breeds and local populations of animals. Differential use-based selection of wild and semi-wild species has also promoted their diversification. The wild relatives of crop plants are integral part of the overall agro-biodiversity. These invaluable bioresources and genetic resources generated through informal breeding along with the traditional knowledge of their use together contribute and enrich the intra-specific agro-biodiversity.

Further to the informal breeding, the organised breeding activities in plants and animals have given rise to array of agrobioresources. This component of agro-biodiversity i.e. intra-specific diversity, including its spatial and temporal distribution, is clearly affected by humans such as farmers, livestock and poultry managers, fishermen, etc. Therefore, its conservation and sustainable use prospects will be influenced by the principles, objectives and other appropriate provisions of CBD and the corresponding national laws as well as by other relevant laws affecting the legitimate access, including the intellectual property rights law, the contract law, etc. Thus, the users of these resources may need more relevant provisions and appropriate facilitation through defined modes and mechanisms to access the agro-bioresources/genetic resources for sustainable use/end-use.

3 Patents on Bioresources Vis-à-Vis Their Sustainable Use

Genetic engineering of available bioresources into new products has been projected as a solution-oriented technology that would release plants and animals with desirable traits such as resistance to specific pests or abiotic stresses, or nutritional enrichment. It is also argued that genetic engineering adds up to the biological diversity to some extent. On the contrary, other arguments suggest this to be more as an economic strategy rather than an evolutionary tool. Thus, it may be important to assess and analyse as to how patents on bioresources and their derivatives could affect their evolution, conservation and sustainable use.

Patenting on bioresources involves patents on gene segments, living organisms, seeds and planting/propagating material, non-biological or microbiological processes, etc. Such patents would apply to bioresources, their parts and processes related to their production and/or economic use in the manner as described and claimed in the patent. These patents would also apply for the entire term of the patent (20 years) to all subsequent generations of the bioresources that have the patented properties. Patent protection would also extend to living modified organisms i.e. bioresources into which the patented genes have been inserted, even when only their normal/obvious molecular properties have been specified.

Considering that the living organisms have the ability to reproduce and be utilized for breeding new varieties through crossing and selection, it is obvious that various novel technological processes and breeding steps may lead to accumulation of several patents on individual bioresource derivatives/products, for example, improved varieties or living modified organisms, and their seed or propagating material.

The sustainable use of patented bioresources could be affected on two counts. Firstly, the patent may have a direct effect on access of patented bioresources by traditional farmers in sufficient quantity and at affordable price. In many cases, patent holders may own the plant variety rights as well. This could fundamentally alter the economic farming conditions as the farmers may be required to access the patented bioresources mainly by licensing agreements. Although it may also be argued that at the end of the term of patent the patented bioresources would enter the public domain and that these shall be freely available for cultivation and use. Yet, as a consequence of the time lag, there could be a significant drift in the sustained or proportional, ecological availability of a patented bioresource as a commodity. Secondly, this situation may pose a possibly-severe restriction of access to patented bioresources as genetic resources for food and agriculture for further breeding and plant/animal improvement. For example, conditional access rights to genome databases coupled with patent claims on gene segments could severely affect the dependent investigations meaningfully for the ‘entire’ field of research. Similarly, patent owners have the right to exclude or restrict others from using the patented bioresources and their propagating material, including that for research.

Various consequences of a restricted or limited availability of genetic resources would depend only on the merits (or limitations) of individual cases. It may be possible to address such situations through suitable negotiations and appropriate licenses. Also, in this context, a broader role of respective national regulatory authorities administering the access to bioresources would be important. At the same time, it may be impossible to intervene at all levels of access, particularly when the custody and exclusive control of the patented bioresources is clearly held by the patent proprietors, and the transacting parties clearly have the options of entering into bipartite agreements or licensing contracts for transactions of patented bioresources as research and breeding tools.

Furthermore, the issues and concerns for patenting of bioresources may be seen from various broader points of view. These include evolution and the scientific, techno-legal, and socio-economic issues and concerns. For example, the evolutionary goals may not be served if the living organisms (including Living Modified Organisms) are being considered at par with any other industrially applicable technical inventions. A gene sequence is more like an information code with many different functions but the holder of a patent that describes just one commercial use of a gene sequence receives a monopoly on all possible functions, which should not be the case. Thus, a gene sequence does not merit receiving the same monopoly that a conventional chemical substance would be entitled to.

Further, the real innovation that is to be promoted by the patent is usually not on the level of gene sequencing, but is downstream from this. Major capital

expenditure is usually made at this lower level. Thus, the granting of patents on genes may lead to unnecessary higher costs for the downstream research, and upstream research and development (R&D). In some cases, the innovation may also be blocked altogether. Similarly, the R&D efforts in agriculture, and plant breeding under constrained access to patented bioresources may cause disproportionately high resulting costs. This may, in turn, affect the cost of seed input; thereby the cost of production, and ultimately the cost of commodity or the price index. Thus, enhanced awareness and familiarization with the issues and concerns, and their management under existing provisions would be necessary to increase the sustainable use prospects of agriculture-related bioresources.

4 Conservation for Sustainable Use

Genetic erosion and vulnerability to changing climates and/or abiotic and biotic stresses are some of the major issues requiring urgent attention and contributory support for genetic resource conservation and sustainable use. The revised State of the World's Plant Genetic Resources issued by FAO (<http://www.fao.org/agriculture/crops/core-themes/theme/seeds-pgr/sow/en/>) highlights that many countries have reported genetic erosion in various crop groups (Fig. 1) wherein the major crop groups affected are cereals and grasses, food legumes, vegetables, fruits and nuts. Thus, looking for suitable agronomic donors in these crops in future could be more difficult if appropriate on-farm conservation measures are not adapted to sustain the dynamic evolution of alternate alleles. Although it is well recognized that both ex situ

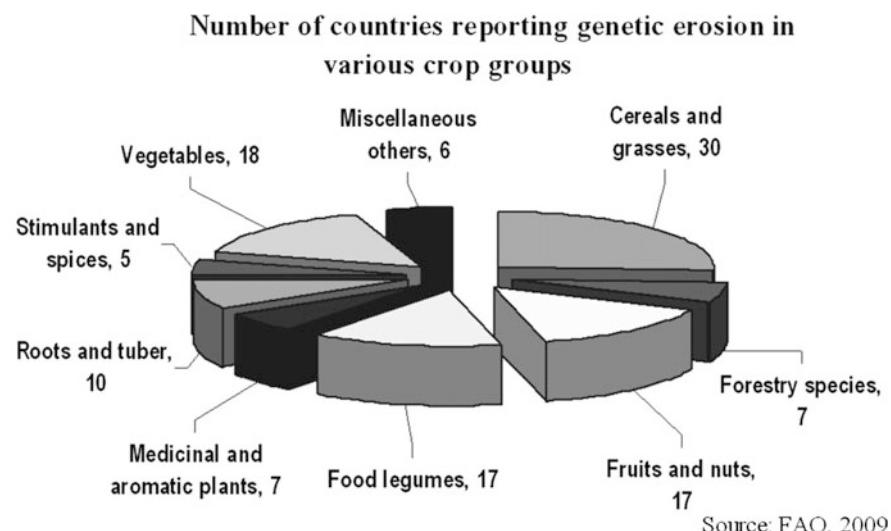


Fig. 1 Number of countries reporting genetic erosion in various crop species

and in situ on farm conservation modes are important and complementary yet the strategies to selectively use these two approaches would rely upon the assurance in terms of the economics, intellectual property entitlements, and the equitable opportunities to the conservers/custodians.

The turn of this millennium has already witnessed some institutional transformations, which were mainly driven by the world trade and environment regimes and to some extent by the food and agriculture regime of the United Nations. The FAO has continued to extend support for governing the regulation of access and benefit sharing for genetic resources under the ITPGRFA. The treaty was reached and signed after seven year long negotiations to provide for (i) multilateral access to ex situ germplasm collections of an agreed list of crops held in gene banks, and (ii) the realization of farmers' rights. This has brought in the envisaged harmony between the CBD and the FAO Global System for the management of plant genetic resources as earlier enshrined in the non-legally binding IUPGR.

The agreed access provisions have been already implemented under the standard material transfer agreement (SMTA) to some extent and ex situ genetic resources held in the international gene banks have been accessed by the experts and institutions the world over. However, this development has not attracted enough donor attention for making further contributions towards the agronomic improvement of crop germplasm despite adequate knowledge on its high potentials and past contributions (Fig. 2).

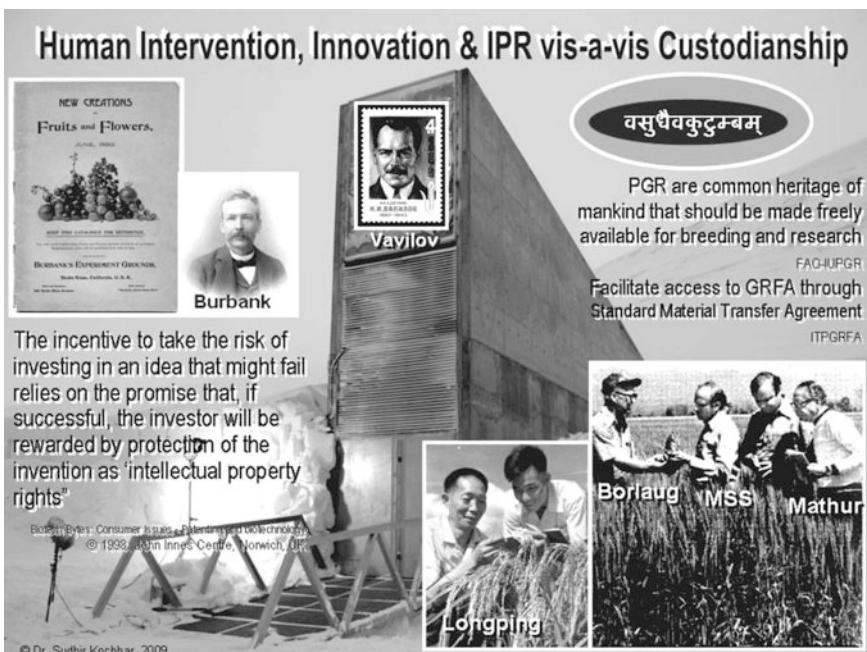


Fig. 2 Genetic resource conservation for innovative and sustainable germplasm use

Also, in the post-ITPGRFA implementation phase, the role and relevance of national ex situ collections vis-à-vis the designated germplasm is yet to be well founded.

5 Enhancement of Genetic Resources for Focused Use

Harnessing the fundamentals of applied biology and crop evolution for focused use in crop/animal improvement requires liberal support for academic and research fields. Innovations and basic research on plants, animals and fish for food and agriculture are needed in the fields of their production and evolution so that their higher productivity along with further adaptabilities and fitness could be promoted in a dynamic continuum under ‘diverse agricultural situations’, and also projected under the ‘climate change’ situation. The essentially biological processes and population behavior would continue to support the subjective fundamentals but it may be generally difficult to strike a balance between or to determine the equity for the use of genetic resources and the novel technology in the field of evolution.

Therefore, enhanced emphasis may be required to simplify and firm up the regulatory provisions that would encourage more human interventions and material contributions towards the genetic enhancement and pre-breeding as well as higher innovativeness particularly in the field of technology for germplasm use, so that sufficient variability and population equilibrium are generated and enriched pools of genetic diversity of cultivated and cultured species are made available for meeting the present and future needs.

There is also the need to further understand and harness the molecular approaches for germplasm characterization, biosystematics and germplasm use. GenBanks of various taxa, cutting across plant and animal kingdoms, supported with systematic bioinformatics units for catering to efficient and effective bioprospecting, gene discovery, phenomics, functional genomics, gene mining and genetic engineering, need to be proliferated around academic and research organizations to support focused research and trait-specific transgenics development in plants, animals, fish and agriculturally important microorganisms. This approach may serve in broadening the window of optimal growth conditions for cultivated crops under adverse climate, thereby increasing probabilities for higher productivity/yield and more stable production under changed climatic conditions.

6 Regulatory Perspective

The CBD recognizes sovereign rights of countries on their biological resources for determining their access to foreigners. The interpretation of ‘sovereign biological resources’ is not provided in the definitions under the CBD. Therefore, under the international law, the appropriation the sovereign agrobioresources of countries as international public good is not ruled out. More so, the benefit sharing from

multilateral exchange of the FAO designated germplasm held in international gene banks may be provided under the ITPGRFA even without tracking their origin. Thus, the countries of origin of germplasm may not be pro-actively consulted for the sharing of benefits of the multilateral exchange of their sovereign genetic resources. Rather, it may be argued that, the realization of farmers' right provision under the treaty has been reduced to a mere tool for collection of benefit sharing amount as determined under alternate modes of payment. More often, the amount thus collected would be so meager that it may even hardly meet the institutional needs of ITPGRFA secretariat. Nevertheless, some funding support to conservation and sustainable use projects has been already institutionalized by the Treaty Secretariat, which is difficult to match at present by the national authorities administering the access and benefit sharing in developing countries.

With the present benefit-sharing fund under the ITPGRFA, it may be hardly possible to support some large-scale, systematic and sustainable programmes to promote on-farm conservation in identified agro-biodiversity-rich areas by direct support through countries. No doubt, the ITPGRFA Secretariat has made a modest attempt and has already approved a few petty projects for funding under the benefit-sharing fund within the first project cycle (http://ftp.fao.org/ag/agp/planttreaty/funding/pro_list09_01_en.pdf). For example, in Asia, only one such project entitled, "Conservation, dissemination and popularization of location specific farmer-developed varieties by establishing village level enterprises" covering all crops has been approved for a non-government organization, Peermade Development Society, India. There is no evidence to suggest that the constitutional authority established under the national biodiversity law had been consulted by the ITPGRFA Secretariat before making such an approval.

At the national level, one possibility to incentivize the farmer-conservers for sustaining on-farm conservation of traditional agrobioresources could be to provide incentives, such as tax holidays or reduced tax rates, to interested donors and financial institutions for providing alternative livelihood support to such farming communities/households within their rural settings so that they may also simultaneously continue to afford the traditional farming *vis-à-vis* the on-farm conservation activities by default.

The Biological Diversity Act, 2002 provides for the regulatory provisions to manage access to bioresources for sustainable use in India as committed under the CBD. There are a number of introduced species/breeds in the country, which over a period of time have naturalized and these agrobioresources have been inherited by individuals and communities over several human generations, thereby leading to new, unique diversity through conscious selections. But, the 'scope' of the Act does not define the biological domain covered. It may, thus, be relevant that countries including India clearly define the biological scope of their sovereign biodiversity domain to enhance purposefulness and clarity in terms of access provisions for bioprospecting and genetic resource use on sustainable basis.

The inclusion of particular references to the components of agro- biodiversity in the national biodiversity laws may help in removing doubts and difficulties related to regulation of their conservation, sustainable use, and equitable benefit sharing.

Most of these national laws were enacted prior to the enforcement of ITPGRFA and, therefore, due attention is also required towards the inclusion of the treaty's provisions related to multilateral access and benefit sharing in these laws. It may also be desirable to highlight the areas of agro-biodiversity importance in the respective country together with the framework, rules and guidelines for regulating/promoting the on-farm conservation and management of domesticated biological/genetic resource in such notified areas.

Further to this, particular cropping systems along with their pre-defined components such as the constituent crop plant species, their prevalent landraces/traditional varieties, etc., under each of these systems could also be notified within the agro-biodiversity rich areas for the purposes of determining the priority and regulating their on-farm conservation. The national laws may have specific provisions to regulate and promote on-farm conservation of the components of agro-biodiversity through participatory and contractual farming approaches with a view to promote incentives-linked private participation and funding investment for these activities. Such provision may also be suitably linked to the regulation of on-farm conservation with the protection of rights of communities i.e. as per the Article 8(j) of CBD.

Similarly, it may be appropriate to notify the current status of the invasive alien species threatening the particular agro-ecological and cropping systems as well as the threatened crop/animal species/endangered species/vulnerable species, category-wise and in order of degree of threat, for determining/underlining and regulating the conservation of indigenous species and their components and systems on a high priority.

Regulation of the components of agro-biodiversity may require vetting from the local statutory bodies, for example the Biodiversity Management Committees (BMC) under the Indian law, in the very first place. Also, a bottom up approach for the documentation of agro-biodiversity components, including those under both cultivated and semi-wild states, on local area basis could be helpful for their long term management, regulation, access and bioprospecting. However, this may require macroanalysis of the prevailing agro-biodiversity in the country. Based upon such overview information, as and when gathered, the national authority administering the biodiversity law may like to draw schemes to extend priority support to identified local statutory bodies in the first place. Such schemes/projects may cover documentation of the historical accounts, such as period of introduction of the source material, extent and range of its current spread, key passport, characterization and valuation information, known traditional uses, including processes and products, commercial use, if any, etc.

Next to this, on-farm in situ and/or ex situ conservation aspects can be documented for similar promotion for sustainable use, access and bioprospecting, etc. The United Nations Conference on Human Environment at Stockholm in 1972 had already proclaimed that the representative samples of natural ecosystems must be especially safeguarded through careful planning or management, as appropriate, for the benefit of present and future generations.

This could be possible through liberal funding support which, in turn, may be encouraged by developing/adopting some simplified and precise regulatory

measures that would assure due incentives or returns or at least some tax concessions to the funding parties/donor agencies. In order to encourage and streamline larger donations for conservation and sustainable use of agrobioresources/genetic resources, it would also be worthwhile assessing as to how competition in big businesses may affect competitive funding support for such biodiversity-related activities on humanitarian grounds.

Countries should be entitled to benefit sharing from the commercial use of the components of their sovereign biodiversity/designated germplasm held *ex situ* for the international community under the custody of FAO in foreign locales, including the international gene banks and botanical gardens, etc., and governed under the ITPGRFA. To this effect, the national biodiversity laws should also have adequate provisions of encouraging the interested parties to transfer their research results (patents) arising from the use of designated germplasm of sovereign origins, in their respective jurisdictions on the condition that transfer of technology including, at least, a part of the industrial/commercial manufacturing through working of patent also takes place in that country. Similarly, another provision should also be made in the national laws to *ex post facto* regularize ownership and benefit sharing matters, in specific cases on the merit of the individual cases and/or on a similar condition that transfer of technology including the industrial/commercial manufacturing through working of patents should, at least partly, take place in the respective country.

7 Conclusion

The agro-biodiversity field, within the overall realm of biological diversity, has some unique features and a greater scope for human intervention. Therefore, a simultaneous understanding of the value and worth of the IPR regime may also be appropriate, which would help in visualizing, on one hand, the sustainable use potentials of agro-bioresources/genetic resources from public domain, and, on the other hand, harness these potentials with the use of appropriate technologies from the exclusive, IPR domain. It may also be relevant developing and pooling prototypes of suitable agreements and contracts for facilitating the IPR transactions and material transfers as a matter of routine.

The handling of transactions on IPR-protected agrobioresources is a techno-legal matter, which also requires authenticity of information disclosed. Therefore, it could be worthwhile collecting, collating and publication of authentic, searchable details of location-specific agrobioresources. Coupled with this, the public or searchable databases of appropriate technologies for specific use of these biological/genetic resources would be relevant in stepping- up formal and effective material transfers and benefit sharing arrangements to eventually promote their sustainable use prospects.

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Chapter 6

Environmental Law: Post-Rio Discussions on Environmental Protection—A *Reflection*

Andrew Ejovwo Abuza

1 Introduction

Between 5 and 14 June 1992, the United Nations Conference on Environment and Development (UNCED) or first Earth Summit was held in Rio de Janeiro, Brazil. The UNCED demonstrated the United Nations (UN) resolve to utilise the instrument of international environmental law in the area of environmental protection.¹ It re-affirmed and built upon the Stockholm Declaration an output of the first global environmental conference, that is, the United Nations Conference on the Human Environment (UNCHE) held in Stockholm, Sweden from 5–16 June 1972. UNCED addressed wide-ranging environmental issues. In a bid to tackle the various environmental challenges, it adopted a legally non-binding declaration on environment and development containing a 27 clause statement of principles intended to guide sustainable development around the World instead of an Earth Charter of environmental rights and responsibilities that was hoped would be adopted as a legally binding document. Other legally non-binding documents produced by UNCED were broad statement of principles for protecting forests and Agenda 21—the major overall document which is considered as a revolutionary environmental action plan for environmental protection worldwide and developing the Planet sustainably through the twenty-first century. It, nevertheless, concluded two legally binding

¹Note that environmental law has been defined as: ‘the field of law dealing with the maintenance and protection of the environment, including preventive measures such as the requirements of environmental impact statements as well as measures to assign liability and provide clean up for incidents that harm the environment’. B.A. Garnered, *Black’s Law Dictionary* (St Paul MN, Thomson Reuters, 2009) 614; There are two broad categories of environmental law, namely, national environmental law and international environmental law. The former is aimed at protecting the environment within a country. Whilst the latter is aimed at protecting global environment.

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documents, namely, the United Nations Framework Convention on Climate Change (UNFCCC) and the United Nations Convention on Biological Diversity (UNCBD).

The UNCED created the United Nations Commission on Sustainable Development (UNCSD) to carry out and oversee the implementation of these agreements. It is rather sad that 20 years after the UNCED, the aforesaid conventions or agreements have not been fully implemented. Thus, the ideas, promises and commitments made at the first Earth Summit have not been substantially realised.

One of the most pressing environmental challenges, that is deforestation which contributes to global warming, amongst other incidence of environmental degradation has continued unabated. This is also the position with regards to pollution of the sea, land and air. The high rate of global warming may largely be attributable to failure of the UNFCCC to set targets and timetables for stabilising emissions of carbon dioxide (CO_2) that had been desired by most industrial nations. For it contains only guidelines and the target dates are: ‘as soon as possible’. Rather unfortunately, the Kyoto Protocol to the UNFCCC concluded in 1997 to address this shortcoming failed to set greenhouse gas emissions reduction limits for developing countries, including India and China among the World’s biggest emitters of greenhouse gases and many of the developed countries have refused to honour their greenhouse gas emissions reduction limits set by the Protocol.

The United Nations Conference on Sustainable Development (UNCSD) or Rio +20 or third Earth Summit held between 13 and 22 June 2012 in Rio de Janeiro, Brazil as a 20-year follow-up to the UNCED and the tenth anniversary of the 2002 World Summit on Sustainable Development (WSSD) or second Earth Summit held in Johannesburg, South Africa failed to take concrete actions to fully implement previous international environmental agreements. Its decisions were not far-reaching and concrete enough to tackle challenges of environmental degradation. The proposals set out at the beginning, such as providing universal energy access and doubling renewables by 2030 were jettisoned by the UNCSD. Also, the draft negotiating text of the UNCSD failed to mention planetary boundaries or nuclear energy notwithstanding the March 2011 Fukushima nuclear disaster in Japan. Furthermore, sanctions were not imposed by UNCSD on UN member-states which had refused to honour their obligations under previous international environmental agreements. Worse still, UNCSD resulted primarily to the production of a legally non-binding declaration contained in a document, ‘The Future We Want’ a 49-page work paper.

After both the UNCED and UNCSD, extensive discussions have taken place on environmental protection. This chapter reflects on Post-Rio discussion environmental protection, analyses international environmental agreements produced at UNCED and UNCSD, identifies obstacles to the full implementation of these agreements and offers suggestions, which if implemented will make the international community attain world environmental order and sustainable development.

2 Concept of Environment

The Nigerian National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act, 2007² defines ‘environment to include: water, air, land and all plants and human beings or animals living therein and the inter-relationships which exist among these or any of them’. This definition, though liable to be criticised for not being exhaustive or encompassing as it excludes natural resources, such as birds, fish, reptiles, insects and so on, is, however, sufficient for our purposes in this article.

3 Historical Background of the 1992 and 2012 Rio Conferences

International actions on environmental protection through the instrumentality of international environmental agreements date back to the early twentieth century. Attempts were successfully made by countries to develop agreements that were signed by multiple governments to prevent damage or manage the impact of human activities on natural resources. These agreements were sometimes legally binding documents that had legal implications when they were not followed and at other times, were mere agreements in principle or were for use as code of conduct. It suffices to state here that such multinational agreements in Europe, America and Africa at the early stages including London Convention for the Protection of Wild Animals, Birds and Fish in Africa 1900; Convention for the Protection of Birds useful to Agriculture 1902; Convention on the High Seas 1958; and International Convention on Civil Liability for Oil Pollution Damage 1969, employed a wide range of regulatory arrangement for structuring, monitoring and protecting the environment.

The Judicial sector of the international community was also at the forefront in check-mating environmental degradation in the early stages of international environmental Law. For example, in 1941 an arbitral tribunal had caused to arbitrate and make pronouncement in the *Trail Smelter Arbitration*³ between the United States of America (USA) and Canada which sparked off consciousness about the environment. The Tribunal which awarded the sum of \$78,000 as damages in favour of the USA held that Canada was liable under international law for the fumes from sulphur dioxide emitted from smelting of lead and zinc by a Canadian company which caused damage to land and crops in the State of Washington on the

²The Act in its section 36 repealed the Federal Environmental Protection Agency (FEPA) Act, Cap F 10 Laws of the Federation of Nigeria (LFN) 2004. It created a new Agency, that is NESREA to replace FEPA, with responsibility for the protection and development of the environment in Nigeria.

³3 RIAA 1905; See also Lake Lanoux, “Arbitration”, XII RIAA, 1963, at 281.

ground that a state was under a duty to prevent its territory from being a source of economic injury to neighbouring territory. This case and the *Lake Lanoux Arbitration* between France and Spain in 1957 acted as an impetus to the adoption by the International Law Association (ILA) in 1966 of the Helsinki rules on the use of international rivers.⁴

Between 5 and 16 June 1972, the UNCHE took place in Stockholm, Sweden. The Conference and its aftermath made known the international nature of the environment and introduced the idea of the relationship between development and the environment. The major outcome document of the Conference was the Stockholm Declaration which consists of a preamble featuring 7 introductory proclamations and 26 principles. Another policy or legal instrument that emerged from the Conference was the Action Plan for the Human Environment. Albeit, the Stockholm Declaration was a mere diplomatic conference declaration or ‘soft law’ agreement which is a legally non-binding document. All the same, it was a signal achievement. For it undeniably represents a major milestone in the annals of international environmental law-making, bracketing what has been called the ‘modern era’ of international environmental law.⁵

The establishment of the United Nations Environment Programme (UNEP) with headquarters in Nairobi, Kenya as a major international environmental protection organisation in 1972 was a major outcome of the Stockholm Conference. Along with other such organisations like the Global Environmental Facility (GEF), UNEP has continued to demonstrate great sense of commitment and responsibility to environmental protection worldwide. International environmental agreements concluded since the UNCHE included: the Great Lakes Water Quality Agreement 1972; Geneva Convention on Long-range Transboundary Air pollution 1979; the Helsinki Agreement (a 21-nation commitment to reduce sulphur dioxide emissions) 1985; the Montreal Protocol on Substances that Deplete the Ozone layer 1988; and the Basel Convention on Transboundary Movements of Hazardous Waste 1989.

These agreements represent conscious efforts geared towards international co-operation on environmental protection, though at a smaller scale.

It should be recalled here that in 1983, the UN General Assembly established the World Commission on Environment and Development (WCED) called the Brundtland Commission after its Chairman, Gro Harlem Brundtland, the Norwegian Prime Minister.⁶ The report of Brundtland published in 1987 as ‘Our Common Future’, declared that the time had come for a marriage between the environment and economy. It employed the term ‘sustainable development’ as the

⁴M.A. Akatugba “International Environmental Law: Influence of International Conventions on Nigerian Environmental Law”, 1(1) *Delsu Journal of Jurisprudence and International Law*, 2006, at 104.

⁵E. Deutsch, available at: http://www.unep.org/documents_multilingual [accessed on January 3, 2013].

⁶Available at: <http://publications.gc.ca> [accessed on January 4, 2013].

way to ensure that economic development would not endanger the ability of future generations to enjoy the fruits of the earth.⁷

Between 3 and 14 June 1992, the UNCED took place in Rio de Janeiro, Brazil. A proposal for an elaborate convention-style draft text for an ‘Earth Charter’ first advocated by WCED legal expert group and drafted about 5 years prior to UNCED as a moral framework for environmental development did not win approval. For it was specifically rejected by the Group of 77 developing countries (G-77) and China as unbalanced emphasising environment over development.⁸ It was a solemn declaration on legal rights and obligations bearing on environment and development, in the mould of the UN General Assembly’s 1982 World Charter for Nature.⁹ Suffice it to state that it affirmed the rights of all citizens of a state to a clean environment and the rights of developing countries to pursue sustainable development.¹⁰ In the end, the UNCED adopted a legally non-binding declaration on Environment and Development. Other international environmental agreements concluded at UNCED were the UNFCCC, UNCBD, legally non-binding Broad statement of principles for protecting forests and Agenda 21. The Conference, as already indicated, constituted the UN Commission on Sustainable Development, amongst other institutions, to implement the decisions reached in same. Needless to stress that sustainable development was a strong undercurrent in the 1992 Rio Declaration.

In 2002, the WSSD or Rio+10 took place in Johannesburg, South Africa. Here, sustainable development was recognised as an over arching goal for institutions at the national, regional and international levels.¹¹ The major outcomes of the Rio+10 included the Johannesburg Declaration and almost 300 international partnership initiatives meant to help realise the Millennium Development Goals (MDGs).¹² Between 13 and 22 June 2012, the UNCSD took place in Rio de Janeiro, Brazil.¹³ The UN wanted Rio+20 to endorse a UN ‘green economy roadmap’, with environmental goals, targets and deadlines, whereas developing countries preferred establishing ‘new sustainable development goals’ to better protect the environment, guarantee food and power to the poorest, and alleviate poverty.¹⁴ In the end, the UNCSD resulted primarily to the production of a legally non-binding declaration contained in the Conference outcome document. It is clear from the document that World leaders re-affirmed previous action plans like Agenda 21 and renewed their

⁷Ibid.

⁸Ibid.

⁹General Assembly Resolution 37/7.

¹⁰*Supra* note 6.

¹¹Available at: <http://en.wikipedia.org/wiki/UnitedNationsConferenceonSustainableDevelopment> [accessed on January 3, 2013].

¹²Ibid.

¹³Ibid.

¹⁴Available at: <http://www.guardian.co.uk/environment/2012/jun/19/rio-20-earth-summit-1992-2012> [accessed on January 3, 2013].

political commitments to the three dimensions of sustainable development, namely, economic growth, social improvement and environmental protection.¹⁵ Pledges made at Rio+20 totaled 513 billion dollars.¹⁶ Affirming that poverty eradication was the greatest and most urgent challenge facing the World today with more than 1 billion people living in extreme want, the document advocated a transition to a ‘green economy’. Amongst other proposals, the document recommended the creation of a high level standing forum on sustainable development to replace the UNCSD ostensibly for its poor performance and the strengthening of UNEP on several fronts in order to make it the leading global environmental authority, by setting forth eight key recommendations, including strengthening its governance through universal membership, increasing its financial resources and strengthening its engagement in key UN coordinating bodies.¹⁷ The document further stressed the development of new SDGs that would build on the MDGs.¹⁸ It was intended that the new SDGs would constitute the development agenda of the World for the period between 2015 and 2030.

It needs to be emphasised here that the document was considered largely as a failure. For many participants¹⁹ expressed their disappointment with the outcome of the Conference.

4 Reflection on Post-Rio Discussions on Environmental Protection

Post-Rio discussions on environmental protection have focused on the 1992 Rio Declaration principles on sustainable development, UNCBD, UNFCCC, Kyoto Protocol to the UNFCCC, Broad statement of principles for protecting forest, Agenda 21 and the 2012, Rio Declaration.

The 1992 Rio Declaration (Rio Declaration) contains principles. Discussions on these principles have been undertaken below.

¹⁵For example, President Goodluck Jonathan of Nigeria re-affirmed his administration’s commitment to achieving sustainable development in Nigeria by creating Jobs in the country. *The Guardian* (Lagos) June 22, 2012 at 4. Scandinavian leaders, for their part, pledged support for systems that would place an economic value on clean water ways, intact forests and other important ecosystems. Mohamed Waheed, President of Maldives announced that his nation would ban damaging fishing practice; and Grenada announced that its transport and electricity sectors would only use clean energy sources by 2030, available at: <http://articles.washingtonpost.com> [accessed 3 January 2013].

¹⁶*The Guardian* (Lagos) June 25, 2012 at 48.

¹⁷Supra note 11.

¹⁸Supra note 16, It is noted that the document actually observed that three years from the 2015 target date of the MDGs, progress has been uneven and the number of people living in poverty in some countries continue to increase.

¹⁹Available at: <http://artical.Washintonpost.com> [accessed on January 3, 2013].

4.1 Substantial Development

Rio Principle I states that: ‘human-beings are at the centre of concerns for sustainable development...’ It goes on to state that they are entitled to a healthy and productive life in harmony with nature. This reflects on anthropocentric approach to the environment in which man’s interests in the environment takes precedence over its intrinsic value. Today, as human understanding of other life forms improves and scientists call for recognising certain species, such as cetaceans, as deserving some of the same rights as humans, the Rio Declaration’s anthropocentric focus appears somewhat dated.²⁰

Another related issue has to do with the fact that an environmental human right does not exist under the Rio Declaration unlike in some regional human right systems such as the note worthy African Charter on Human and Peoples Rights 1981(African Charter) which guarantees in its Article 24 the right of everyone to a protected environment. The stance of the Rio Declaration is not satisfactory. It ought to have adopted the approach of the Stockholm Declaration which in its Principle I does indeed refer to a human’s ‘fundamental right to adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being’.²¹ Sustainable development, as already disclosed, is a strong under-current in the Rio Declaration as demonstrated in its Principle 3. Be that as it may, it does not provide for a definition of the concept. This is the major reason why the actual operationalisation of the concept has remained a challenge to this day.²²

It may be pointed out here that it was the Report of the WCED or Brundtland Report published in 1987 which actually coined the concept or term for the first time many years after the Stockholm Conference. ‘Sustainable development’ was defined by the Report as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.

The concept or term ‘sustainable development’ has been incorporated into the various policies and laws of many states, including Nigeria and United Kingdom (UK). Yet a concrete definition of the phrase indicating in practical terms what must be done is notably absent from such policies and laws. Of course, it is the confusion and ambiguity surrounding the meaning of the concept of sustainable development that made Ban Ki Moon, UN Secretary-General felt compelled on the eve of Rio +20 to reiterate the urgent need for ‘sustainable development goals’ with clear and measurable targets and indicators.²³ Good enough, World leaders at the UNCSD, as already disclosed, agreed to the development of SDGs that would build on the MDGs and constitute the development Agenda in the 2015–2030 years period. At any rate, it would have been helpful if the concept had been rigorously defined and clarified in the 1992 Rio Declaration so that its true meaning was well known.

²⁰Deutsch, *supra* note 5.

²¹Ibid.

²²Ibid.

²³Ibid.

4.2 Sovereignty and Environmental Responsibility in the Use of Natural Resources

Rio Declaration in its Principle 2 recognises the sovereign right of a state to exploit its resources. But makes it apparent that the state's freedom to exploit its resources, however, carries with it a '...responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction'.²⁴ It can be argued that the inclusion of the responsibility of state not to harm areas beyond their national jurisdiction in Principle 2 of the Rio Declaration is of doubtful utility since such responsibility already exist under customary international law.

This contention is grounded on an insightful International Tribunal decision in the *Trail Smelter Arbitration* case, earlier mentioned.

To cut matters short, it is no longer in doubt that the obligation of states to prevent harm to areas beyond their national jurisdiction is a rule of international customary law as could be discerned in the case concerning Pulp Mills on the River Uruguay, where the International Court of Justice (ICJ) decision clearly confirmed that the state's obligation of prevention is one of due diligence.²⁵ However, a major criticism to note is that the decision did not state clearly how this obligation on state to prevent harm with due diligence is to be fulfilled.

4.3 The Right to Development in an Environmental Context

Principle 3 of Rio Declaration recognises the right to development. The reference to a right to development in Principle 3 as aforesaid was seen as a victory for developing countries and a defeat for developed countries, which are opposed to same because this is the first time it had ever been referred to in an international instrument. Needless to point out that the said right was endorsed in the 1993 Vienna Declaration and Programme of Action and the 2000 United Nations Millennium Declaration.

²⁴It gives the reasons which can justify a state's exploitation of resources. The Rio Declaration provides for the sovereign right of states to exploit their own resources pursuant to their own environmental and developmental policies. Of course, the wording of Principle 2 of the Rio Declaration '... pursuant to their own environmental and developmental policies...', may imply that 'development' can be a justification for the depletion of resources. J. Thornton and S. Beckwith, *Environmental Law* (Sweet and Maxwell, London, 1997) at 36.

²⁵Deutsch, *supra* note 5; See also P. Birnie and A. Boyle, *International Law and the Environment* (Clarendon Press, Oxford, 1993) pp. 92–93; it is noted that in this way, the Principle as applied in later international law requires states to do more than merely make reparation for damage, placing an obligation on them to take preventive measures to protect the environment- the precautionary approach. See S. Elworthy and J. Holder, *Environmental Protection: Text and Materials* (Butterworth, London, 1997) at 134.

It might be thought by some leaders of developing countries that pursuit of environmental conservation and protection objectives may work against the realisation of their much-desired goal of economic development. This mindset is far from correct. It is apt to agree with the view postulated elsewhere²⁶ that:

The ‘economic development’ which third World governments claim takes precedent over environmental concerns can still be achieved if concerted efforts are made to do it in a sustainable manner. This is because the pursuit of economic development without considering the potential and ecological consequences will result in a vicious circle of stunted economic growth as a result of environmental degradation.

Without doubt, a mean has to be struck between economic development or growth and environmental protection. The mean as rightly disclosed by Atsegbua and Ezekiel is found in the Principle of ‘Sustainability’.²⁷ This was also emphasised in the WSSD. Today, economic development, social development and environmental protection are deemed the ‘interdependent and mutually reinforcing pillars’ of sustainable development, courtesy of the Johannesburg Plan of Action which emerged from the WSSD.²⁸

4.4 Precautionary Principle

Principle 15 of Rio Declaration enunciates the Precautionary Principle thus: In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Needless to state here that the Principle has already been accepted in several environmental treaties, including the 1992 Baltic Sea Convention and the 1992 Maastricht Treaty.²⁹ It may be pointed out here that the difference between the Principle of Preventive Action and the Precautionary Principle is that the former requires states to take action where there is a foreseeable risk of damage to the environment, whilst the latter requires action to be taken by the state where the risks associated with an activity are suspected but are not fully known.³⁰

²⁶See P.D. Okonma, “Rights to a clean Environment: The case of the People of Oil Producing Communities in the Nigerian Delta”, *Journal of African Law*, 1977, at 64 quoted in L. Atsegbua and M. Ezekiel, “A Critical Appraisal of Environmental Rights under the Nigerian Constitution”, 2 (1) *Benin Journal of Public Law*, 2004, at 61.

²⁷Ibid. it is noted that Principle 3 of Rio Declaration actually envisages this mean. Its reference to meeting environmental as well as development needs, may be taken to imply that development must sometimes be compromised to achieve environmental goals.

²⁸See Johannesburg Plan of Action, Para 5, quoted in Deutsch, *supra* note 5.

²⁹Treaty on European Union Title XVI, Article 130 r(2), quoted in Elworthy and Holder, *supra* note 25.

³⁰Thornton and Backwith, *supra* note 24, at 37.

In its strongest form, the Precautionary Principle may be said to entail a reversal of the onus of proof *vis-à-vis* the potential polluter and the state whose territory may be polluted.³¹ Put differently, the polluter must show that the activities he proposes will not cause harm to the environment, instead of the state demonstrating that they will cause such harm. This is commendable.³²

A germane point to note here is that there is yet no answer to the question of what level of risk is necessary before action must be taken? Worse still, the Rio Declaration or any other international instrument failed to give an authoritative definition of the Principle's contents and scope. This is a major drawback of the Principle. Some states, including the USA have been prompted by the drawback to question its status as both a 'principle of international law' and a *fortiori* a rule of customary international law.³³

4.5 *The Principle of Common but Differentiated Responsibilities*

The Principle can be discerned from Principle 7 of the Rio Declaration which declares that: States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

At the Rio+20, world leaders re-affirmed their commitment to the Principle or Concept of Common but Differentiated Responsibilities ('CBDR').³⁴ Contrary to the viewpoint of Deutsch,³⁵ it is submitted that the expression 'in view of the different contributions to global environmental degradation, states have common but differentiated responsibilities' entails a diminution of the responsibilities of developing countries under international environmental law. To start with, the word 'common' means 'shared by or belonging to two or more people or by the people in

³¹Elworthy and Holder, *supra* note 25 at, 159.

³²Note that originally, it is a party who complaints to the court or alleges any wrongdoing that has the burden of proof. But where a party complains to the court of possible environmental damage of an irreversible nature which another party is committing or threatening to commit, the proof or disproof of the matter alleged may present difficulty to the claimant as the necessary information may largely be in the hands of the party causing or threatening the damage.

³³World Trade Organization, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, paras 7.80–7.83, quoted in Deutsch, *supra* note 5.

³⁴Available at: <http://www.uncsd2012.org/mgzrodrfhtml> [accessed 4 February 2013].

³⁵Deutsch, *supra* note 5.

a group'.³⁶ Second, 'different' means 'not the same as somebody or something'.³⁷ Third, 'differentiate' means 'to recognize or show that two things are not the same'.³⁸ And lastly, 'responsibility' means 'a duty to help or take care of something because of your job, position...'.³⁹ The expression, therefore, can mean no more than in view of the contributions by states to global environmental degradation which are not the same states have a duty to take care of the environment, which is shared by or belonging to all states but that the said duty is not the same. What flows from this is that the degree of responsibilities is not the same. For the responsibilities may be higher for some states and lower for some other states.

Thornton and Beckwith⁴⁰ who share our viewpoint state that Principle 7 is based on the recognition that developing countries have special needs to which priority must be accorded. In our view, a community reading of the Rio Declaration, UNCBD, UNFCCC, Kyoto Protocol to the UNFCCC and the Rio+20 Declaration would reveal a lowering of normative expectations or diminution of the responsibilities of developing countries under international environmental law.

4.6 Procedural Safeguards

The Rio Declaration unequivocally and in mandatory language calls upon states to undertake environmental impact assessment for proposed activities, and to inform and consult with potentially affected other states, whenever there is a risk of significantly harmful effects on the environment. Principles 17, 18 and 19 of the Rio Declaration are the relevant principles here. These principles are commendable. It has been pointed out elsewhere⁴¹ that: At the time of the Rio Conference and perhaps for a short time thereafter, it might have been permissible to question whether the contents of all three principles correspond to international customary legal obligations.

It may be averred that today, given a consistently supportive international practice⁴² and other evidences, including the Draft Articles of the International Law

³⁶S. Wehmeier, *AS Hornby's Oxford Advanced Learner's Dictionary-International Students Edition* (Oxford University Press, Oxford, 7th ed., 2005) at 290.

³⁷Ibid., at 405.

³⁸Ibid.

³⁹Ibid., at 1245.

⁴⁰Thornton and Beckwith, *supra* note 24, at 39.

⁴¹Deutsch, *supra* note 5.

⁴²In Nigeria, the Environmental Impact Assessment Decree 86 of 1992 (now Environmental Impact Assessment Act, Cap E 12 LFN, 2004) requires mandatory environmental impact assessment for certain projects and activities, including Airport, Railways and Water supply and in some other projects and activities where the authority in charge of environment considers same necessary. For details on environmental impact assessment in Nigeria, see B.B. Orubebe, "Environmental Impact Assessment Law and Land use: A Comparative Analysis of Recent Trends

Commission on Prevention of Transboundary Harm from Hazardous Activities, any such doubts would have been laid to rest.⁴³

4.7 The Interface of Trade and Environment

Principle 12 of Rio Declaration provides for this issue. Evidently, the Principle exhorts states to avoid trade policy measures for environmental purposes as ‘a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade’ in a language that closely resembles the Chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT).⁴⁴ It also criticises states’ extra-jurisdictional unilateral actions. Principle 12 stresses that ‘unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.’ Some states do not, however, accept all Principle 12 entails. For example, the USA has postulated an interpretative statement that averred that in certain situations trade measures could be effective and appropriate means of addressing environmental concerns outside national jurisdiction.⁴⁵ This stance appears to have carried the day. As the World Trade Organisation (WTO) Appellate Body first acknowledged in the *Shrimp-Turtle* cases, that unilateral trade measures to address extra-territorial environmental problems may in fact be a ‘common aspect’ of measures in restraint of international trade exceptionally authorised or approved by Article XX of the GATT.⁴⁶

4.8 Public Participation

It is Principle 10 of the Rio Declaration which deals with this issue. In summary, the Principle asserts that access to information, public participation and access to justice, otherwise referred to as ‘environmental access rights’ are critical for sustainable development. The Principle actually reflects the broad consensus of governments that these environmental access rights are essential to addressing

(Footnote 42 continued)

in the Nigerian and United States of America Oil and Gas Industry”, 2(2) *Delsu Law Review-Environmental Law Edition*, 2006, pp. 359–388; S.M. Adam, “Application of Environmental Impact Assessment Law and Policy in Nigeria”, 2(2) *Delsu Law Review-Environmental Law Edition*, 2006, pp. 345–358; and D.F. Tom, “A Review of Corporate Liability under the Environmental Impact Assessment Act in Nigeria”, 2(2) *Delsu Law Review-Environmental Law Edition*, 2006, pp. 449–462.

⁴³Deutsch, *supra* note 5.

⁴⁴Ibid.

⁴⁵Ibid.

⁴⁶Ibid.

environmental issues fairly and effectively.⁴⁷ It can be contended that today they represent established human rights.⁴⁸ It must be stressed here that Principle 10 represents a trailblazer, laying down for the first time, at a global level, a concept that is critical both to effective environmental management and democratic governance.⁴⁹ Its normative provisions must be deemed legally binding on states in view of their reflections in other conventions.⁵⁰

Some states have, in fact, enacted laws which guarantee the environmental access rights. For example, in Nigeria, the Constitution of the Federal Republic of Nigeria (CFRN) 1999 as amended guarantees public participation going by the provisions of same, including sections 39 and 40 which accord to citizens the rights to freedom of expression and the press and peaceful assembly and association, respectively. Access to justice is also guaranteed to Nigerian citizens. The legal substratum for this assertion is sections 6(6)(b) and 36 of the CFRN 1999 as amended. Also, in Nigeria the Freedom of Information Act, 2011 (FOI) guarantees access to information. It should be recalled at this juncture that on 25 June 2012 a Federal High Court (FHC) Abuja directed the clerk of the National Assembly of Nigeria (NAN) to release to the Legal Defense and Assistance Project (LEDAP), a human rights-focused Non-Governmental Organisation (NGO) within 14 days, details of the salary, emolument and allowances collected by legislators of the sixth NAN between June 2007 and May 2011.⁵¹

The Court emphasised that under the FOI Act every citizen of Nigeria was entitled to have access to public information. This decision is commendable. The pronouncement of the Court is bound to open the door for any citizen of Nigeria, for example, to demand for results of environmental impact assessment and other information relating to environmental protection from the Ministry of Environment. Other states should emulate the Nigerian example in a bid to meet their Principle 10 obligations.

⁴⁷Available at: <http://www.wrl.org/project/earth-summit-rio-2012> [accessed on January 3, 2013].

⁴⁸Deutsch, *supra* note 5; It has been postulated that the right to a healthy and decent environment also implies a right to the due process of law, to public participation in environmental decision-making and to access to effective national remedies. Thornton and Beckwith, *supra* note 24 at 46.

⁴⁹Ibid.

⁵⁰Ibid., See, for example, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) and the 2010 UNEP Guidelines for the Development of National Legislation on Access to information, Public Participation and Access to Justice in Environmental Matters, quoted in Ibid.

⁵¹*The Guardian* (Lagos) July 8, 2012 at 16; In a similar vein, Justice Mohammed Liman of the FHC, Benin-city ordered in mid July 2013, the clerk of the NAN to furnish Patrick Osagie Eholor, the plaintiff in a suit filed in the court pursuant to the FOI Act, with details of the salaries, emoluments and constituency allowances of Senator Ehigie Uzamere and Hon. Nosakhare Osahon, representing Edo South Senatorial District and Ovia Federal Constituency, respectively in the NAN. Available at: <http://allAfrica.com/201307180/38.htm> [accessed on August 16, 2013].

4.9 Women in Development

Principle 20 of Rio Declaration deals with the matter. A significant point to disclose here is that the Rio Declaration was the very first international instrument to explicitly recognise that the empowerment of women and specifically, their ability to effectively participate in their countries' economic and social processes, is an essential condition for sustainable development.⁵² Interestingly, this 'women in development' perspective has been strongly endorsed in other international instruments.⁵³ Since Rio 1992, many states have taken measures which have placed women in the commanding heights of politics⁵⁴ and economics through the adoption of programmes, including Women Empowerment Programmes, Poverty Eradication and Food Security Programmes and the Macro-credit Finance Schemes. To cut matters short, across the globe, many women own their flourishing businesses and participate actively in the socio-economic life of their countries.

4.10 Indigenous Peoples

Principle 22 of Rio Declaration deals with the issue. It emphasises the vital role of 'the indigenous people and their communities and other local communities' in the conservation and sustainable management of the environment and recommends that states 'recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development'.

Since Rio, indigenous peoples' special religious, cultural, indeed existential links with land traditionally owned, occupied or used have been further clarified and given enhanced protection in a series of landmark decisions by human rights tribunals as well as the United Nations Declaration on the Rights of Indigenous Peoples.⁵⁵ Similarly, many states have enacted laws which accord to indigenous people's legal rights to the land and resources owned under customary law. In fact, in many of the developing countries the areas of forest under the control of forest people have risen from 21% of the total forest area in those countries to 31% globally, such rights now cover 15% of all forests, compared to 10% in

⁵²Deutsch, *supra* note 5.

⁵³See, for example, the Preambles of the UNCBD and the Desertification Convention. A United Nations Development Programme (UNDP) website actually puts it that gender equality and women's empowerment represent not only fundamental human rights issues, but 'a pathway to achieving the MDGs and Sustainable Development, *Ibid.*

⁵⁴Note that women such as Angela Merkel, Sirleaf Johnson, Dilma Rousseff and Joyce Banda are leaders of government in Germany, Liberia, Brazil and Malawi, respectively.

⁵⁵General Assembly resolution 61/295.

1992.⁵⁶ All the same, a major challenge to note is that these ownership rights to land are severely curtailed in many of the developing countries. Other note worthy challenges are bureaucratic bottlenecks and lack of political will which stand in the way of implementing any real action in most forest developing countries. To sum up, there is failure to enforce laws meant to protect tenure rights of forest people in these countries. It is our contention that without strong rights, landholders have no confidence that they will benefit from measures aimed at sustainable use of their forests. These laws need to be enthusiastically enforced and the involvement of indigenous peoples in the decision-making process on environmental protection issues also needs intensification.

4.11 *The ‘Polluter Pays’ Principle*

It is Principle 16 of Rio Declaration which deals with the matter. Today, given a consistently supportive international practice and other evidence, including the national laws of states,⁵⁷ the “Polluter Pays’ Principle” correspond to international customary legal obligations⁵⁸ or has evolved to become an integral part of international environmental law. In very simple terms, the Principle states that the polluter should pay for the pollution he causes. It seeks to determine and allocate the cost of pollution to the person who is causing it rather than allow the society at large to bear the cost.⁵⁹ According to the government of UK, the Principle is understood as being ‘to make those who cause environmental damage to face the costs of control in full, without subsidy’.⁶⁰

⁵⁶For this and details on the challenges confronting the indigenous peoples, see *The Guardian* (Lagos) June 4, 2012 at 48.

⁵⁷The Principle is well entrenched in many environmental legislation in Nigeria. For example, under sections 12 and 21 of the Nigerian Harmful Waste (Special Criminal Provisions, etc.) Act Cap 165 LFN 1990 (now Cap H1 LFN 2004) and Nigerian FEPA Act, 2004, respectively a victim of environmental harm is entitled to compensation from the violators. Quoted in AE Abuza, “Protection of Endangered Species in Nigeria under the Endangered Species (Control of International Trade and Traffic) Act, 1990”, 1(2) *Delsu Law Review*, 2005, at 319; For details on the Polluter Pays’ Principle, see AOO Ekpu, “The Polluter Pays Principle: A Review of Law and Policy”, 1(1) *Commercial and Property Law Journal*, 2006, pp. 249–263; See also generally, RO Ugbe, “The ‘Polluter Pays’ Principle: An Analysis”, VI–VII, *Calabar Law Journal*, 2002/2003, at 127.

⁵⁸The Principle has found expression in some Treaties on liability for environmental damage, including Convention on Civil Liability for Oil Pollution Damage, 1969, the Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage 1971 as amended by the 1992 Protocols and European Community Treaty establishing the European Economic Community, Rome of 25 March 1957, 298 UNITS 267.

⁵⁹See Ekpu, *supra* note 57, at 250.

⁶⁰Ibid., at 251.

It is not out of context to mention the drawbacks of the ‘Polluter Pays’ Principle which are as follows:

- (i) Difficulty in calculating the precise amounts the polluter should pay.
The Principle is hinged on the wrong assumption that everything under the earth, including the environment, has a market price attached to same. No price can actually be put on clean water or air or human life. It has been postulated correctly that finding the true environmental cost of a polluting activity may be a mirage.⁶¹ At best, the regulators end up speculating or estimating with the result that the polluter is either overcharged or undercharged.⁶²
- (ii) The Principle is an after the damage strategy. It allows the pollution to take place first and then afterwards seek a cure for the resultant harm.⁶³

4.12 Environmental Liability and Compensation

Principle 13 of Rio Declaration deals with the matter. It calls on states to ‘develop national law regarding liability and compensation for the victims of pollution and other environmental damage and stresses the need for states to co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.’

Today, the expectations of Legislative progress generated by the Rio Declaration have finally come to be realised substantially at both the international and national levels.⁶⁴ The drawbacks of the Liability and Compensation Strategy are as follows:

- (i) Payment of money, in most cases, has always served as a fire brigade approach by courts of law which does not provide an enduring solution to the ecological damage inflicted by the pollution or illegal dumping of

⁶¹Ibid., at 260.

⁶²Ibid.

⁶³For details on criticisms of the Principle, see generally Ekpu, *supra* note 57 and Thornton and Beckwith, *supra* note 24.

⁶⁴At the former level, we can give as examples the Draft Principles on Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities and the 2010 UNEP Guidelines for the Development of Domestic Legislation in liability, Response Action and Compensation for Damage Caused by Activities Dangerous to the Environment. At the national level, many states have enacted their own domestic legislation on the matter like, as already disclosed, the Nigerian Harmful Waste Special Criminal Provisions Act 2004 which provides for both civil and criminal liability for oil pollution damage. Under this piece of legislation, victims of oil pollution damage or environmental harm can obtain compensation from the violators.

domestic or industrial wastes.⁶⁵ This may be blamed on the Rio formulation which limits itself to liability and compensation. The approach in Nigeria where in addition to civil and criminal liability as in the Harmful Waste Special Criminal Provisions Act, 2004, NESREA under the NESREA (Establishment) Act, 2007, shall co-operate with other government agencies for the removal of any pollutant excluding oil and gas related ones discharged into the Nigerian environment and enforce the application of best clean-up technology currently available as well as implement best management practices as appropriate. It is NOSDRA under the NOSDRA (Establishment) Act, 2006, that has responsibility to deal or respond to any oil and gas related pollutant discharged into the Nigerian environment. Needless to state here that removal under section 37 of the NESREA (Establishment) Act, 2007, means ‘removal of hazardous substances from the environment of Nigeria or the taking of such action as may be necessary to minimise or mitigate damage to the public health or welfare, ecology and natural resources of Nigeria’.

- (ii) The Principle of liability and compensation is an after the—damage strategy, as already explained. It has been recognised over the years that in cases of environmental degradation and other illicit acts that inflict injuries on persons, no amount of compensation can completely remove the effects of the actions.⁶⁶
- (iii) The unfair and inadequate compensation awarded by the courts. Fair and adequate compensation payable by the polluter should be such as is adequate ‘to restore the person suffering the damage as far as money can do to the position he was before the ‘damnum’ or could have been for the ‘damnum’.⁶⁷ The amount payable in compensation is the current market value of the property damaged, including interests and loss of earnings and use.⁶⁸ Claims for disturbances, nuisance and ancillary inconveniences are also within the provision.⁶⁹ Yet the Nigerian Courts have awarded 200 naira

⁶⁵For an incisive discussion on the drawbacks of the Liability and Compensation Strategy highlighted here, see A.A. Idowu, “Examining the Issue of Compensation for Environmental Degradation and Pollution in Nigeria”, 21–22 *Ahmadu Bello University Law Journal*, 2003–2004, at 148.

⁶⁶This proposition is now subsumed in the principle established by the celebrated United States’ Supreme Court decision in *Aloeboetoe Reparation* case, (1993) USSC, 10 September 8 called ‘*causa causae est causa causati*’ meaning ‘to compel the perpetrator of an illicit act to erase all the consequences produced by his actions is completely impossible since that act causes effects that multiplied to a degree that cannot be measured’. See also Albrecht Ranelzhofer and Christian Tomuschat, *State Responsibility and the Individual* (Kluwer Law International, Netherlands, 1999) pp. 85–86.

⁶⁷*Shell Petroleum Development Company Nigeria Ltd. vs. Farah* (1995) 3 Nigeria Weekly Law Reports (NWLR) (part 382) 148, 192.

⁶⁸Ibid.

⁶⁹Ekpu, *supra* note 57 at 261.

- and other paltry sums as damages for the victim's colossal loss,⁷⁰ in sharp contrast with the position in the USA where American Courts have shown greater willingness to award appropriate damages in environmental cases.⁷¹
- (iv) It is not all victims of pollution who are often beneficiaries of such compensation.⁷²
 - (v) Compensation claims are generally very difficult to prove in court since much scientific evidence and technical data are often required to establish the real nature of the polluting agent and the causal connection between it and the damage complained about.⁷³
 - (vi) Difficulty in establishing liability due to myriad of defenses including natural disaster, act of war, sabotage, third-person malicious act and default of the claimant which in a way are escape routes for violators of environmental legislation.⁷⁴
 - (vii) Litigation is now an expensive 'commodity' which poor victims of environmental degradation may not be able to undertake.
 - (viii) The difficulty which exist in identifying in practical terms the actual polluter in the menace of empty water sachet and cans littered everywhere in the city and countryside.⁷⁵
 - (ix) The potential of the Rio formulation to encourage pollution exist in that it appears to provide that you can pollute for so long as you can pay for the consequences.

In closing on the Rio Declaration, it must be observed that the Declaration itself is a 'soft law' agreement. This means that it is not a formal legally binding agreement.

Agreed, some of the principles contained therein are reflections of existing international customary law. Regardless, many of the principles espoused in the Declaration represent normative expectations yet to be endorsed or made manifest in legally binding international instruments. The Rio Declaration hopes to rely on political persuasion a tool which is largely ineffective to make world leaders, states and other stakeholders of environmental protection meet their obligations under the Rio Principles.

⁷⁰See *Mon vs. Shell BP Development Company of Nigeria Ltd.* (1970–72) 1 Rivers State Law Reports (RSLR) 71 and *Nweke vs. NAOC Ltd.* (1976) 10 Supreme Court (SC) 101.

⁷¹See *In Re Exxon Valdez, De Alaska No. A 89-0095 – CV.* Judgment was delivered on 16 September 1994 wherein the trial Court awarded 5 billion dollars as punitive damages in favour of the plaintiffs which included Alaskan fishermen and property owners in one of the several cases against Exxon Corporation arising from the 1989 Exxon Valdez spill.

⁷²Idowu, *supra* note 65.

⁷³Ibid.

⁷⁴See, for example, the Nigerian Oil Pipelines Act, Cap 338 LFN 1990 (now Cap 07 LFN 2004) section 11(5).

⁷⁵Ekpu, *supra* note 57, at 26.

4.13 Broad Statement of Principles for Protecting Forests

We have already disclosed that the UNCED produced a document containing general statement about forest principles. It advocates the balancing of forest exploitation with conservation and proclaims a basic commitment to keep ‘forest principles under assessment of their adequacy with regard to further international co-operation on forest principles’.⁷⁶ Amongst the principles articulated are: the recognition of the right of states to develop their forests to meet their socio-economic needs, promotion of the transfer of technology to developing countries to help them manage their forests sustainably and the need for all countries to make efforts to ‘Green the World’ through reforestation and forest development.⁷⁷ True, the Declaration sets no rules for forest management. Yet, it endorses the formulation of ‘internationally agreed methodologies and criteria’ on which future guidelines for sustainable management may be based.⁷⁸

The problems of the broad statement of principles for protecting forests are that it is a legally non-binding statement of principles; and the international funding is inadequate, as the estimated costs of international funding for implementing the forests programme is more than six billion dollars a year.⁷⁹

The solution lies in adopting a legally binding convention on world forests. The affected developing countries should increase funding for protection of the forests in their budgets. Developed states should meet their financial commitments geared towards protecting forests in the developing countries. The call by President Jonathan at Rio+20 on developed nations to increase their aid overtures to African countries is a step in the right direction.⁸⁰

5 United Nations Convention on Biological Diversity

At the UNCED, 150 government leaders signed the UNCBD known informally as Biodiversity Convention.⁸¹ It is an international legally binding agreement. The objectives of the Convention as can be discerned from its Article I provisions are

⁷⁶Available at: <http://en.wikipedia.org/wiki/environmentalprotection> [accessed on January 3, 2013].

⁷⁷Ibid.

⁷⁸Ecology, 7 August 1992, quoted in Ibid.

⁷⁹Ibid.

⁸⁰*The Guardian* (Lagos) June 22, 2012, at 4.

⁸¹Note that the continuing and accelerating loss of habitat and species Worldwide despite the existence of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES) and other relevant treaties led to a discussion of the need for a comprehensive global treaty to conserve biological diversity. This paved way for the signing of the Convention at Rio 1992. See S. Fletcher, “International Environmental Issues: Overview”, *Congressional Research Service (CRS) Brief*, updated February 4, 1993, at 9.

the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources, including by appropriate access to genetic resources and by the appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding. Article II of the Convention defines Biological diversity as the variability among living organisms from all sources, including *inter alia*, terrestrial marine and other aquatic ecosystems and the ecological complexes of which they are part, this includes diversity within species, between species and of ecosystems.

Under the Convention, which was the first global agreement that addressed all aspects of biodiversity, genetic resources, species and ecosystems, countries make a commitment to protect endangered species and their habitats.⁸² Measures agreed upon by parties to the Treaty include the compilation of inventories of vulnerable and threatened species at two levels, namely, global and national as well as establishment of strategies for protecting same.⁸³ The Treaty sets rules for granting access to tropical plants and animals, many of which are essential to the genetic tailoring of ingredients for new drugs, pest-resistant crops, fast growing trees and other products. It calls for tropical countries to receive a share of profits from the development of such products and for financial assistance in meeting their obligations under the Treaty⁸⁴; environmental impact assessments for projects that might have wildlife or habitat impacts⁸⁵; and international co-operation in research and development as well as scientific exchanges.⁸⁶

It is rather sad that despite the coming into force of the UNCBD since 29 December 1993 loss of species, habitat or biodiversity worldwide has continued unabated.

Following problems of the Convention on Biological Diversity may be relevant to note:

- (i) Inadequate sanctions in national laws on conservation and preservation of biodiversity.
- (ii) Lack of enthusiastic enforcement of national wildlife and other conservation laws by the regulatory authorities due largely to corruption.
- (iii) Participating countries of the Convention do not share the same level of commitment in protecting endangered species. For example, Elephant-rich Zimbabwe, Namibia and Botswana, are opposed to trade in Elephant ivory.⁸⁷

⁸²The Convention on Biological Diversity, United Nations Environment Programme, Na-92-7807, June 5, 1992.

⁸³Ibid.

⁸⁴Ibid.

⁸⁵Fleteher, *supra* note 81.

⁸⁶Ibid. The focus on conservation of biodiversity by the Convention is not misplaced. For today, conservation of biodiversity is more than an aesthetic or moral issue. It is integral.

⁸⁷*The Guardian* (Lagos) June 20, 1997 at 7 and *The Guardian* (Lagos) June 23, 1997 at 21.

- (iv) It is not all member-states of the UN that have signed and ratified the Convention. The Convention or Protocol is a contract. States are free to sign or opt out of same in line with their sovereign rights without any violation of international law.
- (v) The issues involved in the UNCBD are not well defined. For example, the value of biodiversity itself has not been well defined as a function of place and character.⁸⁸
- (vi) The non-participation of powerful nations of the World such as the USA which refused to sign and ratify the convention even though promised to abide by same.
- (vii) Lack of adequate funding of biodiversity projects in the developing countries for the developed nations are not meeting their financial commitments to assist conservation projects in those countries.
- (viii) Lack of adequate monitoring for compliance with the goals and other objectives of the Convention.

Solutions to the problems of the Convention on Biological Diversity may be as follows:

- (i) The value of biodiversity must be well defined.
- (ii) Enthusiastic implementation of national laws on conservation and preservation of biodiversity which said laws must provide for stiff penalties against violators of same.
- (iii) Developed states should fulfill their promises to provide financial assistance to support conservation and preservation efforts of developing countries on biodiversity and meet their obligations under the UNCBD.
- (iv) More money needs to be budgeted in the developing countries to aid the provision and maintenance of National Parks and other biodiversity projects.
- (v) States that have not already signed and ratified the Convention must be encouraged to do so.
- (vi) Implementation of the UNCBD provisions must be stepped up.

6 United Nations Framework Convention on Climate Change

The UNFCCC which was signed by many countries at the UNCED came into force on 21 March 1994. As at June 2007, 191 countries had ratified the Convention,⁸⁹ which is a legally binding agreement. These countries are referred to as parties to

⁸⁸Supra note 82.

⁸⁹Available at: <http://www.un.org/wcm/content/site/climatechange/pages/gateway/thenegotiations/Durban> [accessed on January 3, 2013].

the UNFCCC. Its ultimate objective is to stabilise atmospheric concentrations of greenhouse gases at a level that would prevent harm to the climate system. Parties to the UNFCCC had agreed to a number of commitments to address climate change including development of special reports called national communications to be submitted periodically on the greenhouse gas emissions of a party and steps to be taken to implement the UNFCCC; implementation of national programmes to control greenhouse gas emissions; development and use of climate friendly technologies; and the provision of financial resources to help developing countries implement their commitments.

A major drawback of the UNFCCC, as earlier highlighted, is the failure of same to set targets and timetables for stabilising emissions of CO₂ and other green house gases. This was what informed the adoption of the Kyoto Protocol to the UNFCCC at the third session of the Conference of Parties (COP) to the UNFCCC in Kyoto, Japan on 11 December 1997. The Protocol with stricter demands for reducing green house gas emissions or binding targets entered into force on 16 February 2005. It has the same ultimate objective of the UNFCCC.

In pursuit of this objective, the Protocol builds upon and enhances many of the commitments already in place under the UNFCCC. Needless to point out that only parties to the Convention can become parties to the Protocol which is also a legally binding treaty.

The binding targets range from -8 to +10% of the World's leading countries' individual 1990 emissions levels 'with a view to reducing their overall emissions of such gases by at least 5.2% below existing 1990 levels in the commitment period of 2008 to 2012.⁹⁰ Commitments under the Protocol vary from nation to nation. The overall 5% target for developed countries is to be met through cuts (from 1990 levels) of 8% in the European Union (EU),⁹¹ Switzerland and most Central and East European states; 6% in Canada; 7% in the USA and 6% in Hungary, Japan and Poland. New Zealand, Russia and Ukraine are to stabilise their emissions, while Norway may increase emissions by up to 1%, Australia by up to 8% and ice land by 10%.⁹² The EU made its own internal agreement to meet its 8% target by distributing different rates to its member-states. These targets range from a 28% reduction by Luxembourg and 21% cuts by Denmark and Germany to a 25%

⁹⁰Note that the 37 industrialised countries and the European Community (Annex I Parties) commitment to reduce their collective emissions of greenhouse gases by 5.2% when compared to the emission levels that would be expected by 2010 without the Protocol, represents a 29% cut. The goal is to lower overall emissions from six greenhouse gases, namely, carbondioxide (CO₂), Methane (CH₄), Nitrous oxide (N₂O), hydrofluoro carbons (HFCs) Perfluoro carbons (PFCs) and sulphur hexafluoride (SF₆) calculated as an average over the 5-year period of 2008–2012 along with some activities in the land use change and forestry sector that remove carbon dioxide from the atmosphere (carbon 'sinks'), available at: <http://www.Kyotoprotocol.com/> and <http://www.un.org/millennium/law/xxvi-23-htm> [accessed on January 3, 2013].

⁹¹Formerly known at the time as the European Community. The EU was made up of 15 states at the time of the Protocol.

⁹²Available at: <http://unfccc.int/Kyotoprotocol/background/items/2881.php> [accessed on January 3, 2013].

increase by Greece and a 27% increase by Portugal.⁹³ It should be pointed out here that the benchmark 1990 emission levels accepted by the COP of UNFCCC (decision 2/CP3) were the values of global warming potential calculated for the Inter-Governmental Panel on Climate Change (IPCC) Second Assessment Report.⁹⁴ In order to compensate for the sting of ‘binding targets’ the Protocol offers flexibility in how countries may meet their targets.⁹⁵

It should be recalled that from 29 November to 11 December 2010, the UN Climate Change Conference took place in Cancun, Mexico to review the Protocol. The Conference was officially referred to as the 16th session of the COP to UNFCCC and sixth session of the COP serving as the meeting of the parties to the Kyoto Protocol. It produced the Cancun Agreements. Key elements of the Agreements include the approval of a process to design a Green Climate Fund under the COP and the establishment of the ‘Cancun Adaptation Framework’ to allow better planning and implementation of adaptation projects in developing countries through increased financial and technical support. The UN Conference on Climate Change took place in Durban, South Africa from 28 November to 11 December 2011 to review the Protocol. It was the 17th session of the COP to the UNFCCC and seventh session of the COP serving as the meeting of parties to the Kyoto Protocol. Amongst the important decisions were: the decision to adopt a universal legal agreement on climate change not later than 2015 and the agreement on a second commitment period of the Kyoto Protocol from 1 January 2013.

Between 26 November and 8 December 2012, the UN Conference on Climate Change took place in Doha, Qatar to review the Protocol. It was the 18th session of the COP to the UNFCCC and eighth session of the COP serving as the meeting of

⁹³Ibid.

⁹⁴Available at: <http://en.wikipedia.org/wiki/Kyotoprotocol> [accessed on January 3, 2013].

⁹⁵Note that three flexible innovative mechanisms have been set up for this purpose. First, ‘clean development mechanism’. In simplified form, it works this way: Industrialised countries pay for projects that cut or avoid emissions in poorer countries and are awarded Greenhouse gas emission reductions credits that can be applied to meeting their own emission targets.

The recipient countries benefit from free infusions of advanced technology that allow their factories or electrical generating plants to operate more efficiently and hence of lower costs and higher profits. And the atmosphere benefits because future emissions are lower than they would have been otherwise. <http://unfccc.int/Kyoto.Protocolbackground/items/288/.php> [accessed on January 3, 2013]; Countries earning the credits this way may apply them to meeting their emission limits, may bank them for use later or may sell them to other industrialised countries under the Protocol’s emission – trading system. Second, ‘emission trading’. It must be pointed out that the Kyoto Protocol sets limits on total emissions by the World’s major economies, a prescribed number of ‘emission units’. Individual industrialised countries will have mandatory emission targets they must meet but it is understood that some will do better than expected, coming under their units, while others will exceed them. The Protocol allows countries that have emission units to spare-emissions permitted them but not ‘used’ – to sell this excess capacity to countries that are over their targets. The rules governing trading were among the workday specifics included in the ‘Marakesh Accords’ of 2001 reached in Marakesh, Morocco. And thirdly, ‘joint implementation mechanism’. Here, industrialised countries will get credit for carrying out joint implementation projects with other developed countries, usually countries with ‘transition economies’.

parties to the Kyoto Protocol. The Conference extended the life of the Protocol which was due to end in 2012–2020. Parties to the Protocol re-affirmed their pledge in Durban to create a new comprehensive legally binding treaty in 2015 that will require green house gas producing countries, including major carbon emitters that do not abide by the Protocol at present, namely, China, India and USA to reduce or limit their emissions of greenhouse gas. The treaty which will take effect in 2020 will fully replace the Kyoto Protocol.⁹⁶ This is commendable. It must be stressed here that the parties to the Protocol had agreed to a second commitment period of emissions reductions from 1 January 2013 to 31 December 2020 which takes the form of an amendment to the Protocol.⁹⁷ The 37 countries with binding targets in the second commitment period are Australia, all members of the EU, Belarus, Croatia, Iceland, Kazakhstan, Norway, Switzerland and Ukraine.⁹⁸ Collectively, these countries will reduce their emissions 18% below their 1990 level between 2013 and 2020. The targets may be strengthened by 2014. Needless to point out here that the emission targets specified in the second commitment period would apply to about 15% of the World's greenhouse gas emissions.⁹⁹

Problems associated with of the Kyoto Protocol are as follows:

- (i) It is not all member-states of the UN that are members of the Protocol. Thus, the provisions of same are not legally binding on some member-states of the UN.¹⁰⁰
- (ii) Emission limits do not include emissions by international aviation and shipping.
- (iii) Technicality of concept. The concept of the Kyoto Protocol, which is a complicated agreement in itself is technical, abstract and a little difficult to decipher the true meanings of the concept and the working formula.¹⁰¹ The Protocol introduced technical phrases such as 'greenhouse gases' 'sinks' 'Green economy' and 'clean development mechanism' which is loaded with complicated details and acronyms.
- (iv) Reduction in emissions demanded by the Protocol is insignificant. The point is that the reduction called for in the Kyoto Protocol are too modest to make a detectable difference in global temperature in the subsequent several decades even if fully achieved with USA participation.
- (v) Problem of achieving consensus in decision-making. Both the UNFCCC and Kyoto Protocol are multilateral instruments with over 191 state parties. Decisions are arrived at the COP of both instruments by consensus. Most

⁹⁶Available at: <http://www.britannica.com//Kyotoprotocol> [accessed on February 2, 2013].

⁹⁷*Supra* note 86.

⁹⁸Available at: <http://unfccc.int.home/Kyotoprotocol> [accessed on February 3, 2013].

⁹⁹*Ibid.*

¹⁰⁰Available at: <http://unfccc.int/Kyotoprotocolbackground/items/288/.php> [accessed on January 3, 2013].

¹⁰¹*Ibid.*

- times, actions or proposals are frustrated by a group of small countries such as the developing countries.
- (vi) Developing countries cannot access funds from the Green Climate Fund and vital technologies promised by developed countries to reduce greenhouse gas emissions in the developing countries.
 - (vii) Difficulty in enforceability of compliance against the powerful nations, the most likely offenders of the Protocol and mainly relied upon to provide funds and deploy the most needed technologies to assist developing countries in setting up projects that would reduce significantly greenhouse gas emissions.
 - (viii) Procrastination over legally binding agreements on climate change.
Kyoto Protocol was adopted on 11 December 1997, but only entered into force on 16 February 2005. Again, it should be recalled that the Protocol's life which was due to end in 2012 was extended to 2020. At the Durban meeting in 2011, parties agreed that a universal legal agreement on climate change shall be adopted as soon as possible but not later than 2015. Yet the parties planned that it would not come into effect until 2020.
 - (ix) Developing countries, including China and India which are clearly industrialised states with nuclear reactors are not mandated to reduce emissions under the Protocol. Good enough, the proposed universal comprehensive environmental agreement expected to come into force in 2020 targets both developed and developing nations.
 - (x) Kyoto Protocol demands are considered to be too strict. Little wonder, some states signed the Protocol but refused to ratify same. Kana states that both Russia and USA refused to sign the Protocol.¹⁰² This is not correct. Both the USA and Russia signed the Protocol on 12 November 1998 and 11 March 1999, respectively.¹⁰³ Whereas Russia ratified the Protocol on 18 November 2004 the USA refused to ratify same,¹⁰⁴ and thus never became a member of the Protocol. Other states which did not ratify the Protocol are Afghanistan, Andora and South Sudan.¹⁰⁵ Canada, in fact, withdrew from the Protocol in November 2011 effective from 15 December 2012.¹⁰⁶ The last minute objection raised at the Doha meeting where parties agreed to a second commitment period by Russia, Ukraine, Belarus and Kazakhstan indicates that they are likely to withdraw from the Protocol or not ratify its amendment and lastly several Annex I parties which participated in Kyoto's first round

¹⁰²Kana, pp. 84–85.

¹⁰³Ibid.

¹⁰⁴Note that by this action Canada appeared to have given up on reaching its target of reducing its emissions by 6% on 1990 levels in 2006, available at: <http://www.ft.com/World/use&Canada> and <http://www.guardian.co.uk/environment/cif> [accessed on February 8, 2013].

¹⁰⁵Kana, *supra* note 102.

¹⁰⁶Available at: <http://www.britannica.com/Kyotoprotocol> [accessed on February 2, 2013].

have not taken on new targets in the second commitment period. These are Japan, New Zealand and Russia.

- (xi) The problem of meeting up with emission deadlines. It should be recalled that the EU had made its own internal agreement to meet its 8% target by distributing different rates to its member-states. States from the developed World were expected to have made demonstrable progress in implementing their emission reduction commitments by 2005. Sadly enough, Britain announced on 29 March 2004 that it would miss the first EU deadline of 31 March 2004 for submitting its plans to cut carbondioxide emissions under the EU's Emission Trading Scheme a part of the Kyoto Protocol.¹⁰⁷ France, Denmark, Greece and other member-states of the EU also missed the deadline.¹⁰⁸ Canada's withdrawal from the Protocol as aforesaid pursuant to article 27 of Kyoto Protocol was in order to avoid heavy penalties for non-compliance with its emissions targets or limitations.¹⁰⁹
- (xii) Absence of stiff sanctions or sanctions. Kana has disclosed as a problem of Kyoto Protocol the absence of stipulated or defined sanctions.¹¹⁰ He points out that the Protocol does not provide in clear terms what actions, how the actions are to be taken or who to take such actions against a country that exceeds its set limits. Kana went too far. True, there are no financial penalties for non-compliance under the Protocol. Regardless, countries that fail to meet their emission targets will be required to make up the difference between their targeted and actual emissions, plus a penalty amount of 30%, in the subsequent commitment period, beginning in 2012.¹¹¹ In addition, they will be prevented from engaging in emissions trading until they are judged to be in compliance with the Protocol.¹¹² It should be recalled that a Compliance Committee was set—up by the Protocol to support the implementation of the innovative mechanisms as aforesaid and promote compliance of Annex I parties with their emission targets. This Committee is the organ imbued with authority to determine and apply consequences for non-compliance.¹¹³ What can be safely postulated is that the sanctions for non-compliance of the Protocol are not stiff or inadequate. Grubb states that the explicit consequences of non-compliance with the Treaty are weak

¹⁰⁷Ibid.

¹⁰⁸Available at: <http://www.un.org/wcm/content/site/climatechange/pages/gateway/thenegotiations/durban> [accessed on January 3, 2013].

¹⁰⁹Available at: <http://en.wikipedia.org/wiki/Kyotoprotocol> [accessed on February 8, 2013].

¹¹⁰A.E. Abuza, "The Problem of Vandalization of Oil Pipelines and Installations in Nigeria: A Sociological Approach", 2(2) *Delsu Law Review*, Environmental Law Edition, 2006, at 277.

¹¹¹Available at: <http://www.guardian.co.UK/environment/2012/jun/11/david-Camerio-rio-earth-summit>, quoted in <http://en.wikipedia.org/wiki/UnitedNationsConferenceonSustainableDevelopment> [accessed on January 3, 2013].

¹¹²*The Guardian* (Lagos) July 2, 2012 at 9 and *The Guardian* (Lagos) July 3, 2012 at 20.

¹¹³Ibid.

compared to domestic Law.¹¹⁴ Only stiff penalties can induce compliance with the law.¹¹⁵ But the imposition of stiff penalties may force many parties to the Protocol to withdraw from same.

The likely solutions to the problems of the Kyoto Protocol may be summed up as:

- (i) All members states of the UN must be encouraged to be members of the Protocol and thus actively involved in its efforts;
- (ii) The Protocol should be amended to take care of emissions by international aviation and shipping as emissions from same constitute a great source of greenhouse gas emissions into the World's atmosphere;
- (iii) Emission deadlines set for the different countries should be met by same;
- (iv) The concept of the Kyoto Protocol and the various terminologies or phraseologies should be simplified for the easy comprehension of global citizenry;
- (v) Developed states should fulfill their promises to provide funds and vital technologies to assist the developing countries in meeting their commitments under the Protocol;
- (vi) Reduction of greenhouse gas emissions demanded by a climate change agreement should be lowered drastically;
- (vii) Emission reduction plans must target both developed and developing countries;
- (viii) Because reliance on the goodwill of state-parties to the Protocol will not make the objectives of the Protocol to be realised, the UN should impose sanctions on member-states which fail to co-operate and or support the efforts of the UN geared towards tackling rising global warming and other deleterious consequences of climate change. Besides, individual states may sever diplomatic and economic ties with an erring state and or take other unilateral measures, including imposition of sanctions to bring same to book or to compel same to join or comeback to the mainstream of international efforts to address climate change challenges;
- (ix) The World powers and other nations must succumb to an effective machinery for the enforcement of the provisions of the Protocol and its successor. This is only practicable if all nations can humble themselves before the international rule of law;
- (x) International awareness programmes must be intensified by the UN to sensitise nations and various non-state actors and people of the World on the real imports of the UNFCCC, Kyoto Protocol and its successor in attaining World environmental order and sustainable development. These

¹¹⁴See *The Guardian* (Lagos) July 23, 2012 at 7.

¹¹⁵See Generally, K. Marx and F. Engels, *Manifesto of the Communist Party*, (Progress Publishers, Moscow, 1975).

- are bound to secure easy compliance and practicability when all and sundry are abreast with the workings of the Protocol or its successor;
- (xi) Efforts must be stepped up to get states that have not yet ratified the Protocol or its amendment such as the USA to do so quickly; and
 - (xii) Increased efforts are needed to get countries like Canada back into the fold while avoiding any more withdrawals from the Treaty, if possible. Political persuasion must, again, be pursued vigorously to get those countries that have not taken second round commitments for the period 2013–2020 to do so very fast.

7 Agenda 21

The goals of Agenda 21 are: to ensure that development proceeds in a sustainable manner—‘the system of incentives and penalties which motivate economic behaviour must be re-oriented to become a strong force for sustainability’¹¹⁶; to eliminate poverty throughout the World through better management of energy and natural resources and improvement of the quality of life by ensuring access to shelter and clean water, sewage and solid waste treatment; to achieve the sustainable use of global and regional resources such as atmosphere, oceans, seas and fresh water, and marine organisms; and to improve management of chemicals and wastes—one-third of the deaths in the third World are in actual fact caused by food and water contaminated with human or individual waste.

Of course, Agenda 21 addresses all those groups and professions involved in the achievement of its goals. This will lead to an increase in the transfer of environmental technologies and highlights the need for financing from the industrialised World to the developing World. A significant point to note at this stage is that the World has seen little or no progress on the realisation of Agenda 21 objectives.

The problems relating to Agenda 21 includes:

- (i) The problem of funding. The minimum amount of funding needed to implement Agenda 21 was not committed. The current total for development assistance from the industrialised World is 55 billion dollars annually.¹¹⁷ It was hoped that the average assistance would amount to 0.7% of each industrial country’s Gross National Product (GNP) to total US 625 billion

¹¹⁶Note that the major social contract theorists are: Thomas Hobbes, John Locke and Jean Jacques Rousseau. For details on their views, see WT Jones, *Masters of Political Thought: Machiavelli to Bentham* (G. George Harrap and Co. Ltd., London, Vol. 2, 1947); L. Strauss and J. Cropsey (ed.) *History of Political Philosophy* (Rand McNally and Co., Chicago, 1963); and R. Nisbett, *The Social Philosophers: Community and Conflict in Western Thought* (Heinemann Education Books Ltd., London, 1974).

¹¹⁷See, for example CFRN 1999 as amended, section 1(2).

- dollars, the estimated annual cost of implementing the 115 projects of Agenda 21.¹¹⁸
- (ii) The United Nations Commission on Sustainable development whose duties include monitoring, assessment and reporting on post-Rio progress has no powers of enforcement. It was expected to utilise moral pressure and public opinion to persuade governments to keep their pledges. Goals in Agenda 21 would remain dead letters unless they could be enforced. No wonder the Commission failed to record any significant success in its duties hence its disbandment at Rio+20 Earth summit.
 - (iii) Agenda 21's legal status is that of 'soft law'. As a 'soft law agreement', Agenda 21 is formally a legal non-binding agreement. This includes that states cannot be held legally bound to provisions of same. In short, there can be no enforcement of provisions of Agenda 21 against any state. This is the major reason why the said Commission had no enforcement powers. Political persuasion or moral-situation has largely proved unworkable in international relations. It is therefore not surprising that little or no progress has been recorded on Agenda 21 objectives.
 - (iv) The concept of sustainable development, as already disclosed, was not defined in the 1992 Rio Declaration or any other international instrument, including Agenda 21.

In the context of above problems it is felt that there should be increased funding of projects in the developing countries by the developed countries to realise the goals of sustainable development and Agenda 21 should be made a legally binding document.

8 Rio+20 Declaration on Sustainable Development

It has been stated earlier that the Rio+20 Declaration is contained in the UNCSD outcome document. The defects in the Rio+20 Declaration may be summed up as follows:

- (i) The Declaration failed to endorse the right of women to decide how many children they would wish to have even though it stressed the vital role of women in sustainable development and reiterated states' commitment to protecting gender equality and women empowerment.
- (ii) The unsatisfactory treatment accorded means of implementation of the Declaration. As already pointed out, the UN wanted Rio+20 to endorse a UN 'green economy roadmap', with environmental goals, targets and deadlines. The push for green economy was one of the most contentious issues during

¹¹⁸Available at: <http://www.peoplesdailyonline.com/columni> [accessed on November 11, 2011] and *The Guardian* (Lagos) October 22, 2011 at 2.

the negotiations with many developing countries opposing same, expressing concern that it would come with burdensome conditions in the areas of trade and development.¹¹⁹ Nigeria was at the forefront of the battle to ensure that targets and other stifling conditions were not imposed by developed countries on developing ones in the push for green economy.¹²⁰ In the end, the developing countries had their way. The Declaration expressed the determination of states to pursue green economy without providing concrete timelines for reaching targets as demanded by NGOs. World leaders preferred instead the development of SDGs by the UN which would build on the MDGs.

- (iii) Failure to endorse a legally binding document on World forests as originally intended. The Declaration merely reiterated the forest principles on sustainable control and management of world forests contained in the Statement of Broad Principles on World Forests adopted at the 1992 Rio Conference.
- (iv) Some World leaders do not consider sustainability as a priority. It should be recalled that key global leaders such as Barak Obama, President of USA, Angela Merkel, Prime Minister of Germany and David Cameron, Prime Minister of UK did not attend the 2012 Earth summit. It has been pointed out elsewhere¹²¹ ‘that their collective absence was seen as a reflection of their administrations’ failure to prioritize sustainability issues.’ The lack of priority attention to sustainability by these World powers is bound to have negative impact on the Declaration’s push for sustainable development. As these countries are pivotal to the success of sustainable development practice globally considering their weight and leadership role in World politics.
- (v) Some new and emerging challenges such as providing universal energy access and doubling renewable by the year 2030 contained in proposals set out at the beginning were left out of the Declaration.
- (vi) The Declaration is a ‘soft law’ agreement. As a mere diplomatic conference declaration it is a legally non-binding document.
- (vii) The Rio+20 Declaration failed to focus on sanctions against erring states. Instead, it merely called on such states to honour their obligations under the various agreements. The Declaration failed to address the issue of planetary boundaries and nuclear disaster a new and emerging challenge. On 1 March 2011 Japan’s worst nuclear disaster took place in Fukushima Daichi No. 1 Nuclear Power Station in Northeastern Japan due to a major earth quake and ensuing tsunami triggering the worst radioactive leakage in history.¹²² The disaster which displaced 50,000 households compelled the

¹¹⁹ Available at: <http://www.guardian.co.uk/Environmental/Rio+20EarthSummit> [accessed on February 4, 2013].

¹²⁰ Available at: <http://www.uncsd2012.Orgmgzerodraft.html> [(accessed on February 4, 2013].

¹²¹ The document was actually described as a failure on the ground that it was too weak to tackle the challenges facing the Planet. *The Guardian* (Lagos) June 21, 2012 at 5.

¹²² *The Guardian* (Lagos) July 2 and 3, 2012.

Japanese authorities to shut down all 50 nuclear reactors for maintenance. It needs to be stated here that nuclear power produced about 30% of Japan's electricity before the disaster.¹²³

The above defects need to be cured and the possible ways have been identified below:

- (i) Women must be empowered to make their own decisions on how many children they would wish to have.
- (ii) A detailed identification of gaps in means of implementation, especially with regards to the green economy is urgently required.
- (iii) There is urgent need for a legally binding convention on World forests.
- (iv) There is need for all countries to accord sustainability issues priority.
- (v) There is the need to make the Rio+20 Declaration a 'convention style' declaration that is legally binding on states with clearly defined or stipulated sanctions for non-compliance.
- (vi) Nations must tackle some new and emerging challenges, including provision of universal energy access, doubling renewable by the year 2030, planetary boundaries and nuclear disaster.
- (vii) Due to the capitalist hold on the environment in both the developing countries¹²⁴ and developed World, it might be sensible, even though it may sound ruthless and socialist, for the people to protest against their governments and take over the hold of the environment from the capitalists. From both Marxist and Bourgeois standpoints, a violent overthrow of the government is justified in the face of massive exploitation of the workers or the people, according to the Marxists¹²⁵ and violation of fundamental rights such as rights to life and property, according to social contract theorists.¹²⁶ In many states, there is massive exploitation of workers and other underprivileged citizens as well as violation of the rights of the people to a protected environment, life and property. For many people have lost their fish, cassava plants and other valuable properties due to pollution from oil companies' activities. Moreover, many global citizens have lost their lives due to environmental degradation, including radioactive leakages into the atmosphere and oil pollution. In this way, the rights to property and life of global citizens are being eroded.

¹²³The *Guardian* (Lagos) July 23, 2012.

¹²⁴Ibid., at 7.

¹²⁵See Generally, K. Marx and F. Engels, *Manifesto of the Communist Party*, (Progress Publishers, Moscow, 1975).

¹²⁶Note that the major social contract theorists are: Thomas Hobbes, John Locke and Jean Jacques Rousseau. For details on their views, see W.T. Jones, *Masters of Political Thought: Machiavelli to Bentham* (G. George Harrap and Co. Ltd., London, Vol. 2, 1947); L. Strauss and J. Cropsey (ed.), *History of Political Philosophy* (Rand McNally and Co., Chicago, 1963); and R. Nisbett, *The Social Philosophers: Community and Conflict in Western Thought* (Heinemann Education Books Ltd., London, 1974).

9 Observations

It is clear from the foregoing reflection on Post-Rio discussions on environmental protection that the international environmental agreements emanating from the UNCED have largely been ineffective in tackling environmental challenges. Thus, international efforts to tackle environmental challenges as represented by these agreements have not yielded the desired results. This is due to numerous shortcomings. The delegates to the Rio+20 actually observed that with less than three years to the target date of the MDGs, that is, 2015 poverty has continued to increase, especially in developing countries.¹²⁷ To cut matters short, the delegates to the UNCSD seemed to have acknowledged the failure of sustainable development efforts worldwide. According to them¹²⁸:

...despite efforts by governments and non-state actors in all countries, sustainable development remains a distant goal and there remain major barriers and systemic gaps in the implementation of internationally agreed commitments. We resolve to redouble our efforts to eradicate poverty and hunger and to ensure that human activities respect the earth's ecosystem and life support systems. We need to mainstream sustainable development in all aspects of the way we live.

It has already been indicated that the Rio+20 Declaration has largely been considered as a failure which will offer little or nothing to the advancement of the cause of sustainable development globally in the years ahead.¹²⁹ This is also due to numerous shortcomings. A major shortcoming that is worthy of note here is that most of these agreements including the Rio+20 Declaration are 'soft law' agreements, which are formally legal non-binding agreements. It has also been observed that the people in the various countries of the World are not being carried along by their governments on sustainable development efforts. We consider it bizarre and sad to observe that despite street protests by over 150 000 Japanese people who had demanded an end to nuclear power generation, the Japanese government went ahead with its decision to re-start nuclear reactors as the Nuclear reactor at the Nuclear Power Plant in Western Japan was re-started on 1 July 2012.¹³⁰ Of course, this is a clear indication that the Japanese people are not being carried along by the government on sustainable development efforts.

¹²⁷ Available at: <http://www.guardian.co.uk/Environmental/Rio+20EarthSummit> [accessed on February 4, 2013].

¹²⁸ Available at: <http://www.uncsd2012.Orgmgzerodraft.html> [accessed on February 4, 2013].

¹²⁹ The document was actually described as a failure on the ground that it was too weak to tackle the challenges facing the Planet. *The Guardian* (Lagos) June 21, 2012 at 5.

¹³⁰ *The Guardian* (Lagos) July 2 and 3, 2012.

10 Recommendations

The bane of international agreements is inadequate enforcement of these agreements. International environmental agreements are no exceptions. A critical recommendation that is worthy of note is that failure to enforce agreements should be seriously and urgently addressed by the international community. This is necessary so as not to create the impression that the international community itself is not serious with enforcing international environmental agreements. Other critical recommendations are that states must rise above pettiness and other parochial interests and conclude legally binding environmental agreements and be prepared to meet their obligations under same or face appropriate sanctions as well as the government must partner with the people on environmental issues as enjoined by the Rio Declarations. Put differently, there must be a synergy between government and the people on sustainable development. Only a working partnership between the government and the people can save the environment from further problems.¹³¹

11 Conclusion

This chapter has reflected on Post-Rio discussions on environmental protection and has also identified shortcomings in the various international environmental agreements considered. It has equally proffered suggestions and recommendations, which if implemented will go a long way toward the attainment of World environmental order and sustainable development.

¹³¹*The Guardian* (Lagos) July 23, 2012.

Chapter 7

Principles of International Environmental Law: Application in National Laws of Bangladesh

Gazi Saiful Hasan and Sheikh Ashrafur Rahaman

1 Introduction

Environment is a common concern of all human being in the world. The formal development of environmental law is the result of several international initiatives. It goes back to 1980s when first universal step was taken by the international community because of being worried about environment. In last three decades, international environmental law has developed immensely. Obligations were created for nations to apply several international instruments of environmental law. Bangladesh is also trying to develop its legal framework on the basis of international environmental law. It is important to note that Bangladesh is in susceptible situation for various environmental changes. So it needs to be more careful regarding environmental protection and development. International environmental law can play a vital role against environmental degradation and influence national legislation in Bangladesh.

The objective of the chapter is to find out the commonly used and recognized principles of international environmental laws. The origin of such principles and application in international instruments are also discussed accordingly. Other objectives are to show the relation between principles of international environmental laws and domestic laws, application of those principles in national laws of Bangladesh and give possible recommendations to use environmental principles as the tool to mitigate environmental degradation, and to preserve and improve the quality of environment.

2 Brief Scenario of Environmental Laws in Bangladesh

People of Bangladesh observe to a great extent various impacts of environmental degradation because of manmade actions as well as natural disasters every year. The fight against the causes of environmental degradation started in Bangladesh after achieving its independence in 1971. The first step of the new-born country in the interest of preserving and conserving environment was Water Pollution Control Ordinance, 1973.¹ Later, the Pollution Control Ordinance was made for the overall protection of the environment from the pollution in 1977. These laws were enacted out of the concern against environmental degradation in Bangladesh. Institutions of taking steps for environment, i.e. Pollution Control Board and Ministry of Environment, were established to work for some specific area of environment protection. The concept of environmental protection changed significantly in the last decade of twentieth century with the drafting of Bangladesh Environment Policy in 1992. The main focus of Bangladesh Environment Policy is to enlist the guidelines for the protection and preservation of environment. Following the guideline of that Policy, Environmental Conservation Act, 1995 was enacted for environment conservation, the improvement of environmental standards, and control and mitigation of environmental pollution.² To ensure the access to environmental justice the Environment Court Act, 2010 has also been passed by the Parliament. There are many other laws which have been enacted (in last 20 years) for the protection of environment such as the Forest Act, 1927; the Building Construction Act, 1952; the Brick Burning Control Act, 1989; the Disasters Management Act, 2012; and Wildlife (Preservation and Protection) Act, 2012. Constitution is the supreme law in Bangladesh but there was no clear provision referred in the Constitution related to environmental protection until 15th amendment of the Constitution came into effect. The new provision of the Constitution, Article 18A states that the state shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forest and wild life for the present and future citizens. The provision included in the part of fundamental principles of state policy of the constitution paved the way for making or interpreting laws regarding environmental protection.

¹The Department of Environment, Bangladesh, available at <http://www.doe-bd.org/overview.html>, [accessed on 6 January 2013].

²The Bangladesh Environment Conservation Act, 1995, available at http://bdlaws.minlaw.gov.bd/bangla_pdf_part.php?act_name=&vol=%E0%A7%A9%E0%A7%A7&id=791, [accessed on 6 January 2013].

3 Principles of International Environmental Law and Its National Application

There is no constitutional provision regarding the application of international laws in national courts of Bangladesh. From the judgment of various cases, it can be stated that application of provisions of international law by national court of Bangladesh depends upon the inclusion of principles in municipal laws. It is only when provisions of international laws are incorporated in national laws that the courts apply such provisions. In case of the presence of clear domestic provisions, the subject international law is not applied. In case of the absence of such provisions, national courts of Bangladesh take it as the guiding principle. In a case, *Bangladesh v. Samboon Asavhan*,³ the appellate division of Supreme Court held that it is well settled that where there is municipal law on an international subject the national court's function is to enforce the municipal law. In another case, *Hussain Mohammad Ershad v. Bangladesh and Others*,⁴ it is held that international instruments are not binding unless it is incorporated in the domestic law. Bangladesh Supreme Court in various instances has referred to these non-binding instruments for the interpretation and application of national law. It did so in the case of *Dr. Mohiuddin Farooque v. Bangladesh*,⁵ where the right to life protected under the constitution was discussed by reference to the resolution of the World Health Organization.⁶

Principles regarding environmental issues are found in different international instruments. Basically, it has been covered in various international hard and soft law instruments such as declaration, treaty, convention, etc. Principles of international environmental law have also been recognized as the foundation of taking steps to make laws in developing the quality of environmental. Here two international declarations, i.e. Stockholm declaration, 1972 and Rio de Janeiro Declaration, 1992, can be referred as the best examples where most of the principles of international environmental law were identified. Stockholm declaration opened the door for taking initiatives in order to protect environment in modern age. After 20 years of Stockholm Declaration, another declaration was announced in the city of Rio de Janeiro, Brazil named Rio Declaration added to its corpus of principles invented by Stockholm. The development of environmental principles has been an intrinsic part of the wider development of international environmental law and policy. Most referred and important principles of international environmental law are discussed below.

³(1980) 32 DLR (AD).

⁴21 BLD (AD) 69.

⁵17 BLD (AD) 1996.

⁶D. Shelton, *International Law and Domestic Legal System* (Oxford University Press, United States, 2011) available at ukcatalogue.oup.com/product/9780199694907.do#.USRsaWBK94ZE, [accessed on 5 February 2013].

3.1 Sustainable Development

The principle of sustainable development (SD) has already been treated as a great component of environmental protection. The principle of sustainable development has been linked to various other concepts, such as intergenerational and intragenerational equity, principle of integration, sustainable use of natural resources and biological diversity. There is no way to deny the development activities are a must. But development without considering sustainability may cause environmental damage. The development and environment co-relation therefore is vital principle of international environmental law. The concept of SD is found in different international instruments. The idea of SD was used in the World Commission of Environment and Development report in 1987 where it found itself at the centre of the environment/development and North/South discourses.⁷ The term SD refers to a development that meets the needs of present without compromising the ability of future generations to meet their own needs.⁸ The principle of SD was incorporated in Rio de Janeiro Declaration. Principle 4 of the declaration states that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Thus, it is clear that environmental protection along with the development policies is a must for sustainable development and environmental protection and implementation of development policies should go hand in hand to attain the goal of SD.

In the *Flood Action Programme (FAP)* Case,⁹ the Bangladeshi court applied sustainable development in an indirect manner and gave priority to a development project funded by international donors.¹⁰ Taking an anthropocentric view, the court defined sustainable development which integrates a quality of life that is economically and ecologically sustainable. Another case of *Khushi Kabir and Others v. Government of Bangladesh and others*¹¹ is also relevant in this context. It deals with commercial shrimp cultivation and its adverse effect on the socio-economic development and on sustainable development.¹²

⁷Report of the World Commission on Environment and Development: Our Common Future, 1987, available at www.un-documents.net/our-common-future.pdf, [accessed on 1 February 2013].

⁸“What is Sustainable Development?”, *The World Bank Group*, available at www.worldbank.org/dep/home/sep/web, [accessed on 2 February 2013].

⁹48 DLR 1996 SC BD.

¹⁰J. Razzaque, “Access to Environmental Justice: Role of Judiciary in Bangladesh”, available at www.eng-consult.com/BEN/papers/Paper-jona.PDF, [accessed on 20 January 2013].

¹¹WP-3091 2000, High Court Division.

¹²N. Mohammad, “Environment and Sustainable Development in Bangladesh: A Legal Study in the Context of International Trends”, 2 ARPN Journal of Science and Technology, Special Issue, ICESCR, 2012.

3.2 *Polluter Pays Principle*

The first mention of the principle at the international level is to be found in the 1972 Recommendation by the OECD Council on Guiding Principles concerning international Economic Aspects of Environmental Policies, where it is stated that ‘the principle to be used for allocating cost of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called polluter pays principle’. It also gave the definition of PPP that ‘This principle means that the polluter should bear the expenses of carrying out the measures decided by public authorities to ensure that the environment is in an acceptable state’.¹³

The PPP, a generally recognized principle of international environmental law, has been widely accepted as a means of paying for the cost of pollution prevention and control.¹⁴ The principle simply refers that the person, who is responsible for creating pollution, should be made financially responsible for the damage caused to others. It has also been incorporated in principle 16 of Rio de Janeiro Declaration where it is said that ‘National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment’.¹⁵ This provision reflects the normative obligation to take steps regarding the same by the state.

National laws of Bangladesh have also incorporated the PPP principle of international environmental law. The Bangladesh Environment Conservation Act, 1995 provides that director general of the department of environment can oblige a person to pay where such person is responsible directly or indirectly for the injury to the ecosystem or person or group of persons. Section 9 of the said Act includes the power to ensure payment by any person responsible for excessive discharge of pollutant.

3.3 *Precautionary Principle*

The precautionary principle aims to provide guidance in the development and application of international environmental law where there is scientific

¹³Richard Reibstein (ed.), “Polluter Pays Principles” available at http://www.eoearth.org/article/Polluter_pays_principle, [accessed on 5 January 2013].

¹⁴J. Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh*, available at books.google.com.bd/books?isbn=9041122141, [accessed on 6 January 2013].

¹⁵The Rio de Janeiro Declaration, 1992; available at www.un.org/documents/ga/conf151/aconf15126-1annex1.htm, [accessed on 10 January 2013].

uncertainty.¹⁶ It can also be treated as a preventive step or preventive principle for the environment protection. The principle requires identification and concentration of some matters which may affect the environment and also imposes an obligation to take some initiatives as precaution for future uncertain damage which may be caused by development action. Preventive principles can be traced back to international environmental treaties and other international acts of 1930s. The precautionary principle only began to appear in international legal instruments in the mid-1980s, although prior to that it had featured as a principle in domestic legal system, most notably that of West Germany.¹⁷ But a new dimension in the form of a principle of international environmental law has been created when we found the principle used in different soft and hard instruments of international environmental law. Rio declaration states that in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities.¹⁸ An obligation upon states has been imposed to prevent possible threats and harm of environment. Framework Convention on Climate Change, 1992, a hard law, refers that the parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.¹⁹

Precautionary principle is considered in Bangladesh as a guiding non-binding principle for policymaking. This principle has been used frequently in substantive laws. Environmental courts of Bangladesh can apply the principle while deciding environmental cases. In Bangladesh, the Wildlife (Protection and Safety) Act, 2012; the Protection and Conservation of Fish Act, 1950; and the Forest Act, 1927 integrate the precautionary principle. Bangladesh Environment Conservation Act, 1995 also includes provisions containing the precautionary principle. Section 9 (1) of the Bangladesh Environment Conservation Act, 1995 states that 'Where, due to an accident or other unforeseen incident, the discharge of any environmental pollutant occurs or is likely to occur in excess of the limit prescribed by the rules, the person responsible and the person in charge of the place of occurrence shall take measures to control or mitigate the environmental pollution'. The Act also empowers the Director General of Department of Environment to take necessary remedial measures to control or mitigate the environmental pollution and to get damages from person responsible for the occurrences. Section 16 of the Act provides that a company will be liable for environmental damages or degradation if it violates any provisions or direction of environmental laws unless it is proved that the violation or failure was beyond the knowledge or that due diligence was exercised to prevent such violation or failure.

¹⁶Philippe Sands, *Principles of International Environmental Law, Principles and Rules Establishing Standards* (Cambridge University Press, UK, 2nd ed., 2003) at 267.

¹⁷Ibid.

¹⁸WP 3091.

¹⁹Framework Convention on Climate Change, 1992, available at <http://unfccc.int/resource/docs/convpk/conveng.pdf>, [accessed on 5 February 2013].

3.4 Environmental Impact Assessment

Environmental impact assessment (EIA) is a formal process for identifying likely effects of activities or projects on the environment, and on human health and welfare it also includes measures to mitigate and monitor these impacts. It means the assessment of possible environmental harms or damage which may be caused by various development activities. Before taking up any development activities in a country environmental assessment is a must. And if the assessment indicates likelihood of serious harm and environmental degradation, the development activities should be stopped. This principle is incorporated in Rio Declaration. Principle 17 of the declaration states that EIA, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a component national authority. EIA principle also gives the opportunity to ensure public participation and also access to information relating to environmental measures.

The Bangladesh Environment Conservation Act, 1995 incorporates the use of this principle. The Bangladesh Environment Conservation Act mandates the necessity of environmental clearance certificate for any kinds of establishment. To get the environmental clearance certificate of red categories of establishment, it is mandatory to submit EIA report along with the application. Department of Environment considers the application on the basis of examining EIA report and other necessary elements. EIA report motivates the responsible department not to issue environmental clearance certificate in case of such establishment which may affect environment seriously.

3.5 Intergenerational Equity

The principle of intergenerational equity has been developed as one of the most accepted and important principles of international environmental law. The principle has been examined as well as developed by several international and regional instruments. Basically, the use of this principle assures each generation the right to receive the planet in no worse a condition than received by the previous generation, and views the environmental and resource conservation obligations of the present generation from that perspective.²⁰ Stockholm declaration, 1972 refers to principle 2 that the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.²¹ Principle 3 of Rio declaration states that the right to

²⁰*Supra* note 7.

²¹The Stockholm Declaration, 1972 Conventions, available at www.unep.org/documents/default.asp?documentid=97&articleid, [accessed on 5 January 2013].

development must be fulfilled so as to equitably meet development and environmental needs of present and future generation.²² Article 3 of the Framework Convention on Climate Change, 1992 also refers to the necessity of taking actions for the benefit of present and future generations of humankind. The preamble of Biological Diversity Convention, 1992 shows that the convention itself was based upon the determination of contracting states to conserve and sustainably use biological diversity for the benefit of present and future generations. A famous case of International Court of Justice, i.e. the *Nuclear Test Case II*, can also be referred in this regard. In that case, Justice Weeramantry pointed out the involvement of important principles of environmental law. Intergenerational principle was also uttered along with other principles of international environmental law. The court recognized the intergenerational rights of future generations.²³

A new provision has been added by 15th amendment of the Constitution of Bangladesh which provides a guiding obligation to protect and improve the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forests and wildlife for the present and future generations.²⁴ It is believed that this provision will to some extent accelerate environmental justice in Bangladesh. The scenario of applying the principle in national courts of Bangladesh was not satisfactory before being placed in the constitution on the ground that neither the constitution nor the national legislation of Bangladesh explicitly mentions the principle.²⁵

3.6 Harm Prevention

Harm prevention generally refers to the efforts of preventing serious harm or damage of environment caused by various actions. International obligation is also found in this regard. States should be aware of their activities so that it cannot affect others. The *Trail Smelter Arbitration* is widely accepted as the starting point for the development of the no harm rule. But while the case only dealt with transboundary harm to other (neighbouring) states, the Stockholm principles and other subsequent international agreements also include the principle in the context of global commons. States are under an obligation to protect the environment of other states and areas beyond national jurisdiction from damage caused by activities on their territory. Principle 7 of Stockholm declaration refers that States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to

²²*Supra* note 18.

²³The International Court of Justice, available at <http://www.icj-cij.org/docket/index.php?sum=502&code=nzfr&p1=3&p2=3&case=97&k=cd&p3=5>, [accessed on 10 February 2013].

²⁴Article 18A, The Constitution of People's Republic of Bangladesh.

²⁵*Supra* note 7.

interfere with other legitimate uses of the sea. The prevention principle is the fundamental notion behind laws regulating the generation, transportation, treatment, storage, and disposal of hazardous waste and laws regulating the use of pesticides. The principle was the foundation of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), which sought to minimize the production of hazardous waste and to combat illegal dumping.²⁶ Principle 14 of Rio declaration mentions that states should effectively cooperate to discourage or prevent the relocation and transfer to other states of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.²⁷

The Bangladesh Environment Conservation Act, 1995 allows Director General of Department of Environment to take measures for the prevention of probable accidents which may cause environmental degradation and pollution, undertaking safety measures and determination of remedial measures for such accidents and issuance of directions relating thereto. Besides, many other national laws of Bangladesh are enacted to prevent actions harmful for environment.

4 Conclusion

Principles of international environmental law should be considered by legislature of Bangladesh while making legislation relating to the protection of environment. The judiciary needs to consider using principles of international environmental law in cases, which includes interpretation of national environmental laws. Provisions should be included in the Constitution of Bangladesh regarding the use of international legal instruments while deciding the case in the national courts of Bangladesh. Principles of international law have already been incorporated in various international hard law instruments and also in national laws of various countries in the world. It is high time that government in Bangladesh should make and amended existing laws to incorporate such principles of international environmental law which will move us towards environmental justice. The right to clean environment must be meaningfully ensured to citizens of Bangladesh.

²⁶Encyclopedia Britannica, available at <http://www.britannica.com/EBchecked/topic/765435/environmental-law/224614/The-prevention-principle>, [accessed on 2 January 2013].

²⁷*Supra* note 18.

Chapter 8

Technology for Climate Cha(lle)nge: Issues and Concerns

V. Rajyalakshmi

1 Introduction

Climate change due to global warming is a challenge that is yet unmet. Despite the long held understanding that global warming is more due to human activities than the natural causes and hence the solution to the problem also lies in a great part in rectifying our plans and actions, nothing remarkable has happened so far and the global warming is continuing unabated. This, however, does not mean that no attention has so far been paid or no action is pursued to combat the problem of climate change. Climate change has indeed been taken up as a serious challenge, at least, since the Earth Summit, 1992 and continuous efforts have been going on. But the prospects of majority of climate change strategies and actions encounter blocks leaving them at cross roads.

2 Technology and Sustainable Development

Since long technology has been a very important aide for human development. Technology in its varied forms helped the human society to overcome many of its vulnerabilities. On the negative side, technology has a large share in the current state of environmental affairs. Deployment of technology at massive scale in industrial and other economic enterprises while facilitating quick and large-scale economic growth has at the same time contributed to large-scale pollution and rapid depletion of natural resources beyond sustainable limits. On the positive side, it is the technology itself which is providing solutions to many environmental problems. When employed judiciously and equitably, technology has a great role to play in

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achieving sustainable development. Thus, in the modern era, techno-centric approaches or strategies have become an inevitable component of any policy to meet any environmental goal. This is particularly true in the case of climate change goal.

The multidimensional problem of climate change needs a multipronged approach to the same. Therefore, technological approaches are as sought after as legal dictates. This, however, does not mean that technology is independent of law. It has to work within the dictates of law. Technology particularly developed a special niche for itself in international environmental law. Particularly, it is understood that any solution to climate change problem depends upon robust attention toward the use of technology.

From technological perspective, the two important requirements are as follows:

- (i) Wide application of the existing environmental friendly technologies; and
- (ii) Quick invention of new technologies to replace the anti environmental practices or technologies.

To complement the above requirements, the challenges before the international environmental law are as follows:

- (i) To create normative space and develop further legal arrangements for facilitating wider application of existing environmental friendly technologies through transfer of technology; and
- (ii) To audit the environmental and legal compatibility of new technologies to ensure sustainable development.

Contemporary international environmental agreements adopt techno-inclusive approach keeping in mind the potential of technological solutions to many environmental problems.

3 Transfer of Technology(TT) for Climate Justice—Issues and Challenges

Contemporary international environmental agreements adopt techno-inclusive approach keeping in mind the potential of technology to reduce many environment-related problems. Since the international environmental law has to operate in a divided world of Haves and Have Nots, it has to devise environmental policies that take into consideration the problems of states coexisting in an uneven world. The legal dictate of the transfer of technology which is found in major instruments of international environmental law precisely reflects this approach. This dictum of transfer of technology derives its space from human rights ideology, principles of the doctrine of sustainable development and from the norms inscribed in different environmental agreements. Article 27 of the Universal Declaration of

Human Rights (UDHR),¹ 1948, and Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),² 1966 speak about the human right to share in scientific advancement and enjoy its benefits provide the philosophic foundation for the claim of all needy states to have access to technology. It lends philosophical support to international cooperation to develop equitable arrangements for the transfer of technology between the Haves and Have Nots. The human right approach to climate justice through transfer of technology is endorsed by the Cancun Meet³ which spoke of fully respecting human rights in all climate change actions and the Bali Action Plan⁴ according to which technology is one of the four pillars of the Action Plan.

The need for transfer of technology is well founded in the concept of sustainable development which accommodates within it the principles of Right to Development, Polluter Pays, Global Partnership, and Common but Differential Responsibility. It is widely known that the problem of climate change is predominantly due to emissions of green house gases (GHG). Solution to the problem of climate change obviously lies in reducing the GHG emissions. Therefore, the 1992 United Nation Framework Convention on Climate Change (UNFCCC) aims to achieve the same. However, the practical block in this regard is the impact of emission reduction actions on the prospects of economic growth. It is primarily because of this reason that the South raises its placard of Right to Development and resists every slightest move to impose legal commitments on it to reduce GHG emissions. They also justify their resistance on the basis of the principle of Common but Differential Responsibility.

The principle “Common but Differential Responsibility” is premised on the argument that even though the problem of climate change is global in nature and calls for global partnership in remedial actions, there is an absolute need to recognize that the capabilities of the South and North are not uniform to implement remedial strategies. The South lags far behind the financial and technological

¹The UDHR, 1948, Article 27 says everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

²The ICESCR, 1966, Article 15(1) The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; and (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity. (4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields.

³The Cancun Conference took place from 29 November to 10 December 2010.

⁴In 2007, the Bali Action Plan, agreed at the 13th Conference of the Parties (COP) of the UNFCCC, reaffirmed the centrality of technology development and transfer.

capabilities of the North. Hence, the South cannot be made a working partner in reducing global warming. The South also justifies its stand on the ground that since the North has major share in causing global warming it has to undertake major responsibility of reducing the same on the basis of the principle of Polluter Pay. Thus the Climate Change Convention, 1992 has developed a legal framework which provided uneven legal commitments for its state parties to reduce GHG emissions. Thus the third world countries are exempted from any commitment to reduce GHG emissions.

The principles “Common but Differential Responsibility” and the “Polluter Pays” also provide another equity dimension in meeting the climate change goals. As stated earlier, in the modern era, techno-centric approaches or strategies have become an inevitable component of any legal policy to meet any environmental goal. In tune with this approach, all major international environmental agreements including the Climate Change Convention, 1992 provided the normative space for transfer of technology from the North to the South. Thus, the UNFCCC⁵ and Kyoto Protocol⁶ contain provisions relating to transfer of technology.

So far as the normative space for transfer of technology is concerned, technology development and transfer are provided for in both the UNFCCC and its Kyoto Protocol. The Convention requires all Parties to promote and cooperate in the development, application, and diffusion, including transfer, of GHG mitigation technologies.⁷ It stipulates⁸ that developed country Parties should provide new and additional financial resources to support the transfer of technology and take all practicable steps to promote, facilitate, and finance the transfer of, or access to, environmentally sound technologies and know how to developing country Parties. The Convention further prescribes⁹ that financial resources shall be provided for the transfer of technology on a grant or concessional basis.

The Kyoto Protocol¹⁰ reiterates the requirement of all Parties to cooperate in the development, application, diffusion, and transfer of environmentally sound technologies that are in the public domain. The Protocol also reaffirms¹¹ the commitment of developed country parties to provide financial resources for technology transfer.

Technology has a great role to play not only in the case of mitigation but also with regard to adaptation. Climate policy regime largely discussed technology transfer in the context of mitigation in which all countries are interested. In contrast, the issue of transfer of adaptation technologies in which developing states alone are keen has been sidelined, notwithstanding the urgency of respective measures, in

⁵The Climate Change Convention, 1992, Articles 4.1(c) and 4.5.

⁶The Kyoto Protocol, 1997, Article 10.

⁷*Supra* note 5, Article 4.1.

⁸*Id.*, Articles 4.3 and 4.5.

⁹*Id.*, Article 11.1.

¹⁰*Supra* note 6, Article 10(c).

¹¹*Id.*, Article 11.2.

particular for least developed nations and regions. A change of trend is visible from Copenhagen Meet.¹² The Copenhagen Accord contains a decision “to establish a Technology Mechanism to accelerate technology development and transfer in support of action on adaptation and mitigation”. In the Cancun Meet,¹³ in order to strengthen technology development and transfer, Governments decided to establish a Technology Mechanism which will be accountable to the COP. Technology mechanism includes Technology Executive Committee (TEC)¹⁴ and Climate Technology Centre and Network (CTCN)¹⁵ as its component parts. Governments agreed that the Technology Mechanism should be fully operational in 2012.

In its Special Report on Methodological and Technological Issues in Technology Transfer, the Intergovernmental Panel on Climate Change (IPCC)¹⁶ defines technology transfer “as a broad set of processes covering the flows of know-how, experience and equipment for mitigating and adapting to climate change amongst different stakeholders such as governments, private sector entities, financial institutions, non-governmental organizations (NGOs) and research/education institutions.”¹⁷

This definition covers every relevant flow of hardware, software, information and knowledge between and within countries, from developed to developing countries and vice versa whether on purely commercial terms or on a preferential basis. The IPCC acknowledges that the treatment of technology transfer in this Report is much broader than that in the UNFCCC or of any particular Article of that Convention.¹⁸

While there is general acceptance of the principle of transfer of technology being an essential requirement of sustainable development, disagreement continues over crucial issues when it comes to implementation.

Some such issues and concerns are as follows:

¹²The Copenhagen Summit was held in December 2009 in Denmark. The Conference included the 25th COP of UNFCCC, and 5th Meeting of Parties of Kyoto protocol.

¹³The Sixteenth Session of the Conference of the Parties to the UNFCCC and the sixth session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol took place in Cancun from 29 November to 11 December 2010.

¹⁴The mechanism includes a Technology Executive Committee (TEC) will strive to increase public and private investment in technology development and transfer. The TEC will also assist in providing an overview of needs for the development and transfer of technologies for mitigation and adaptation. Additionally, it will recommend policies and actions to boost technology cooperation.

¹⁵Climate Technology Centre and Network (CTCN) facilitate national, regional, sectoral and international technology networks, organizations and initiatives. The CTCN will aim to mobilize and enhance global clean technology capabilities, provide direct assistance to developing countries, and facilitate prompt action on the deployment of existing technologies. Furthermore, the center will encourage collaboration with the private and public sectors, as well as with academic and research institutions, to develop and transfer emerging technologies to the best effect.

¹⁶The text of IPCC is available at <http://www.ipcc.ch/pdf/special-reports/spm/srtt-en.pdf>.

¹⁷Ibid.

¹⁸Ibid.

- (i) Unwillingness of the developed countries to make effective avenues for meaningful transfer of technology;
- (ii) IPR barriers blocking the flow of advanced technology. Numerous scholars have examined the interaction between the climate change and intellectual property treaty regimes and raised concerns over the ways in which the intellectual property regime might hinder needed technology transfer; and
- (iii) Ambiguities about—what constitutes technology transfer? What is meant by “environmentally sound technology”? What is “appropriate technology”?

There is no clear cut definition of technology transfer. Even most of the developing countries that have included technology transfer under the sustainable development criteria for Clean Development Mechanism (CDM)¹⁹ projects do not define the concept of technology transfer clearly. Given such lack of clarity as to what is meant by technology transfer in the CDM context, different CDM project developers seem to have taken the liberty to interpret the concept in their own ways (often with the aim of facilitating the approval of the project). How such technology transfer should take place and the role of law in facilitating those transfers. For example, under the CDM, developed countries can get credit for greenhouse gas emissions reductions projects in developing countries, and much controversy has ensued about whether that mechanism is achieving its goals or allowing developed countries to avoid emissions reductions.²⁰

How to determine what is environmentally sound technology? What are the parameters? Agenda 21 provides certain parameters.²¹ How do we decide which technologies meet these criteria? Who should be the final decision maker? Should the determination of environmental friendly technology be the environmental problem specific? For example, in the context of climate change should the assessment of environmental friendliness of the technology be assessed only on the basis that it reduces global warming irrespective of its contribution to another environmental problem? e.g., use of nuclear power. While some core technologies are clearly environmentally sound, definitional issues abound especially with regard to the emerging new technology with uncertain consequences. Soundness also depends upon temporal and geographical factors, to the extent that some

¹⁹The Clean Development Mechanism (CDM) is an arrangement under Article 12 of the Kyoto Protocol of the United Nations Framework Convention on Climate Change (UNFCCC) which allows developed country parties (so-called Annex I countries) with a greenhouse gases (GHG) reduction commitment and developing country Parties (so-called Non Annex I countries) to jointly undertake emission reduction project activities in developing countries that contribute to sustainable development and result in certified emission reduction (CER).

²⁰An article by Professor Michael Wara in 2008 examined the nature of CDM projects and found that a substantial percentage of them were not focused on core sustainable energy technology development.

²¹It defines environmental friendly technology as those which protect the environment are less polluting, use all resources in a more sustainable manner, recycle more of the wastes and products, and handle residual wastes in a more acceptable manner than the technologies for which they were substitutes. SIV, Chap. 34, 34.1.

technologies may be environmentally sound but may be replaced by even cleaner technologies.

- (i) UNFCCC²² speaks about taking all practical steps to promote, facilitate, and finance, as appropriate, the transfer of, or access to, environmental friendly technologies. The issue is what constitutes appropriate technology and when does the transfer become appropriate? In situations where the given technology is per se safe, questions of appropriate stage of transfer might not be troublesome. But, with regard to new technologies, questions arise about the stage at which it is considered to be appropriate. The appropriateness of any technology is a dynamic notion. A technology that is not suitable for one place may be suitable for another or in a different time for the same place.²³ Any specific technology introduced needs to satisfy the existing production system. Otherwise even if the technology introduced is of high grade it would be of no use. If the new technology is too complicated to function within the existing production equipment, this type of technology transfer would not be successful. Always the best technology to transfer is not the effective one but the one which fits the best with the local situation and circumstances.²⁴

The CDM glossary of terms does not define “technology transfer.” However, it can be inferred from the information in the PDD (Project Design Document)²⁵ that project participants almost universally interpret technology transfer as meaning the use of equipment and/or knowledge not previously available in the host country by the CDM project. The arrangements for the technology transfer, whether on commercial or concessionary terms, are never mentioned. In the CDM context, different CDM project developers seem to have taken the liberty to interpret the concept in their own ways. Several of the CDM projects claimed technology transfer for technology already available in the country. Since the focus of the Kyoto Protocol is on technology transfer between countries, those cases were classified as involving no technology transfer.

- (ii) Currently, major role in the TT process is played by the private actors both in the capacity of transferors and transferees. Their lack of capability,

²²The UNFCCC, Article 4.5 speaks about taking all practical steps to promote, facilitate, and finance, as appropriate, the transfer of or access to, environmental friendly technologies and know how to other parties, particularly the developing country parties to enable them to implement the provisions of the Convention. In this process, the developed state parties shall support all development and enhancement of endogenous capacities and technologies of developing country parties. Other parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies.

²³Md Rabiul Amin, “Technology Transfer for Sustainable Development through Clean Development Mechanism (CDM): The Bangladesh Perspectives”, The Thesis presented for the degree of Doctor of Philosophy at *Mundoch University*, 2005.

²⁴*Id.*, at 135.

²⁵Project Design Document.

willingness, or judiciousness in taking into cognizance all relevant factors like assessment of appropriateness, feasibility, or effectiveness of such technology renders such transfer an inappropriate one and often it causes negative impact.

- (iii) Ignorance of developing countries is exploited to transfer outdated technology. Europe and North America indulge in the practice of transferring technology to developing nations of Asia and Africa which is mostly outdated, e.g., Dhaka Leather Complex case.²⁶ Such technology transfers do not contribute to fair sustainable development. Many Project Design Documents contain inadequate and sketchy information about technological issues.
- The normal practice is that the project proponents try to exaggerate the technology transfer component of a project to increase the chance of getting the project cleared by the Designated National Authority for CDM. Due to the lack of capacity and resources, the approving host states are not in a position to verify the claims project developers and investors.
- (iv) TT generally serves business interests and elite classes and consumer markets without any concern for environmental issues and other social impacts. It is generally observed that the technology needs identified by the CDM host countries are predominantly for project types that rely on imported technology than on local technology.
- (v) Ill informed choices about technology, it is know how, mode of transfer, acquisition, service, markets, etc. can have negative impact. Other reasons for bad choice include omission of endogenous perceptions, lack of long-term vision, lack of coordination of different but interrelated planning and administrative agencies, non-consideration of capabilities of potential users, pure techno-economic approach of looking at only the intrinsic merit of the technology and not its relevance to the operating domain, lack of proper prioritization, etc. Whereas pure techno-economic approach is suitable to developed states, contingency approach involving the consideration of the capability of potential users, availability of infrastructure, etc. is best suitable for developing states.
- (vi) CDM is mostly associated with large industrial and power sectors. As a result, majority countries of the South are deprived from the benefits of CDM for sustainable development.²⁷ Another concern of CM is distracting

²⁶Dhaka leather complex was transferred from The Netherlands. After painting the machinery twice or thrice, it was priced high about three or four times higher and sold to private actor from Bangladesh.

²⁷Technology transfer is more common for larger projects; 39% of all CDM projects accounting for 64% of the annual emission reductions involve technology transfer. Technology transfer varies widely across project types. Technology transfer is more common for projects that have foreign participants, possibly because those projects tend to be larger. Unilateral and small-scale projects involve less technology transfer, possibly due to their smaller size. Within any given group foreign participants, unilateral, small-scale technology transfer is more common for larger projects,

- investment policies of host countries from crucial fields of public importance, like health, education, etc.
- (vii) A study on CDM projects revealed that the contribution of the CDM to technology transfer can at best be regarded as minimal. Out of 1000 projects studied, only 265 involve technology transfer. Among these, 259 projects qualify for Type III TT, in which technological learning and capability building are restricted only to the level of operation and maintenance of an imported technology. Only six projects involve technology transfer of Types I or II, in which the host country entity is either found to develop a technology in collaboration with some foreign entity; or the host country entity is involved in in-house technological efforts toward adapting or improving upon an imported technology.²⁸
 - (viii) Given that the core objective of a project participant in a CDM project is to generate carbon credits in a cost-effective manner, any decision regarding the choice of technology and its source is bound to be subservient to this core objective. Given this predominant motive, the project participants may, in general, be expected to look for knowledge elements in any technology import deal only to the extent necessary for successful operation of the project concerned. This seems to be one of the key reasons why learning benefits, wherever present, are generally found to be confined only to the basic level of operational knowledge of an imported technology. Moreover, the decisions on technology and its source are likely to be influenced largely by a host of other entities involved in the CDM project concerned, who may not have any interest in ensuring that the project contributes to technological learning and capability building in the host country.²⁹
 - (ix) The host country is empowered to lay down the criteria for sustainable development. But majority of the developing countries are ignoring this in approving CDM projects. For several politico-economic factors, the host countries are adopting a rather lenient approach in approving the CDM projects, thereby failing to utilize whatever potential the CDM may be having as a vehicle for technology transfer.³⁰
 - (x) Lack of vision demonstrated in giving preference to approve fossil fuel-based energy projects rather than projects of nonrenewable energy will in the long run create undesirable dependence within the developing world on declining and unsustainable resources.

(Footnote 27 continued)

Analysis of Technology Transfer in CDM Projects, Final Report December, 2007 prepared by UNFCCC, available at <http://cdm.unfccc.int/Reference/Reports/TTReport/TTRep07.pdf>.

²⁸Kasturi Das, *GCD Working Paper 014*, July, 2011, at 30, available at <http://www.uea.ac.uk/international-development/research/gcd/Das+2011>.

²⁹Ibid.

³⁰Ibid.

- (xi) A major problem is the problem of “a race to the bottom” approach of the developing countries. They compete with each other through retrogressive lowering of environmental laws, clearance criterion, etc. in a bid to attract foreign investment in the form of CDM projects.

4 Emerging Technologies for Climate Change

So far as the emerging technologies for climate change are concerned, major problem is the scientific uncertainty about their environmental safety. For example, a few scientists support that Arctic Sea ice melt may be contained through aerosol injections during sunlit months to avoid ozone layer depletion.³¹ On the other hand, few other scientists contend that the possible quantity of Aersol needed for the purpose would have serious ozone implications.³² Questions are afoot regarding the relative risks associated with the decision that might be taken either to employ the technology or avoid the same. If the decision is taken to avoid, the employment of the new technology doubts lingers whether the possible advantage of a useful technology to bring about climate change is unnecessarily lost due to the fear factor. On the other hand, if the decision is to employ the new technology, doubts linger about the possible risks. In the process of giving green signal to the new technology, dilemmas also would be faced about the ideal scale of operation that would be safer to experiment on to assess the environmental soundness of the new technology promising to be an effective climate change action. Sometimes, the type of area selected for technology testing for its environmental soundness might matter more than the scale of operation, e.g., ecologically fragile zones. The following example of CCS technology illustrates these dilemmas.

4.1 Carbon Capture Storage (CCS) Technology

CCS is an emerging technology as technological solution to climate change. In this method, CO₂ would be captured at source point and stored in chosen domains like oceans or underground. Five types of geologic formations considered the most likely sites for geologic sequestration are as follows:

³¹See Michael Mac Cracken, “Beyond Mitigation: Potential Options for Counter-Balancing the Climatic and Environmental Consequences of the Rising Concentrations of Greenhouse Gases”, *World Bank Policy Research*, Working Paper No. 4938, 2009, available at www.climate.org/PDF/World-Bank_Beyond-Mitigation_MacCracken.pdf.

³²For example, Bidisha Banerjee, “The Limitations of Geoengineering Governance in a World of Uncertainty”, 4 *Stan J. L. Sci. and Pol'y*, 2011, at 15; Alan Robock, ‘Whither Geoengineering?’, 320 *Science*, 2008, at 1166.

- (i) deep saline aquifers, underground rock formations whose pore space is saturated with saltwater;
- (ii) coal seams, including those that are deep and unmineable and shallower coal beds too thin to be mined economically;
- (iii) oil and natural gas reservoirs, underground rocks with pore space that holds oil or natural gas; and
- (iv) oil- and gas-rich organic shales, and basalt, a volcanic rock with a chemical makeup that converts the CO₂ to a solid mineral form, thus isolating it from the atmosphere.

The potential of carbon capture and storage (CCS) to reduce CO₂ emissions from fossil fuel power generation and industrial processes is substantial. In addition, a transfer of CCS technologies from industrialized to developing countries can help ensure a more sustainable economic development and a gradual withdrawal from fossil energy.

Risks of geological sequestration include risks related to emissions from injection points, emissions from aboveground and underground installations and reservoirs, seepage, lateral flows, migrating plumes, including carbon dioxide dissolved in aqueous medium migrating outside the project boundary, massive and catastrophic release of stored carbon dioxide, and impacts on human health and ecosystems.

From the legal perspective, the challenge is the lack of legal provision and possible incompatibility with existing law or exposure to conflicting laws. Geological sequestration in deep sea bed domain which is meant to be a technological solution to the problem of CO₂ emissions renders an example of the struggles of seemingly environmentally sound but an emerging technology has to encounter.³³ Recently, in the final stages of the climate negotiations in Cancun participating countries agreed on a decision that could allow CCS projects to earn offsets under the CDM, given that a list of criteria³⁴ are addressed and solved. The draft decision recognizes that CCS is a relevant technology for the attainment of the ultimate goal of the Convention and may be part of a range of potential options for mitigating greenhouse gas emissions. However, the scientific uncertainty that still surrounds the environmental safety of this technology raises lurking doubt—whether the developing world is being chosen as testing ground to check its environmental soundness through CDM methodology.

³³See, V. Rajyalakshmi, “Geological Sequestration of CO₂: The Domain of Deep Sea Bed”, 51(1) *Journal of Indian Society of International Law*, 2011, pp. 42–66.

³⁴See, UNFCCC Decision of 10th December 2010, FCCC/KP/CMP/2010/L.10.

5 Conclusion

Climate Change legal governance requires more intense efforts to weed out the imperfections and ambiguities involved in implementing the equity measure of transfer of technology. Though incremental efforts are being put into strengthen the transfer of technology mandate, say like the recent establishment of Technology Mechanism by UNFCCC, more concrete steps are yet to be initiated. Thus, the Cancun Text though contains a broad outline of the mechanism; several important details remain to be worked out in the future, including the governance structure of the Mechanism and its link with the financial mechanism. Many contentious issues like the synergies between IPRs and Technology transfer need to be worked out. Since developing countries have great stakes in the technology transfer, they on their part must further explore and develop all other possible avenues which effectively facilitate the transfer of climate-improvising technology from North to South. The South on its part must forge strong South–South cooperation so that the Third World countries would overcome their individual temptation to competitively attract foreign ventures by self-imposed vulnerabilities like lax environmental, administrative and technical screening processes. With concerted efforts, South should be able to develop a collective Road Map that would block the entry of sham and inappropriate transfer of technology.

Chapter 9

Current Perspectives on Environmental Law

Saligram Bhatt

1 Introduction

Let us first define environmental law (EL). As part of international law, EL is a creative discipline for progress of humankind. It is not concerned merely with prohibitions and permissions. EL consists of human expectations that may vary as per ecological needs. Yet, EL is concerned with the overall unity in the diversity of global environment, because the planet earth is one large ecological inter-dependent unit. The global warming and climate change have proved our point. The anthropologist Margaret Mead says that all humans are one species called *Homo sapiens*; and variety in global life only strengthens the unity of mankind. So says Rabindranath Tagore on unity of humans which is the mystery of all mysteries.

2 International Cooperation to Protect Earth

Having grasped what environmental law is, we come to major issues that concern us regarding global environments. We are engaged in preventing degradation of earth. We need to save our Mother Earth that gives us life shelter, food, water, forests, plants, airspace and lands. The Stockholm Declaration on Human Environment made by the United Nations in 1972 is the benchmark in our awareness about our mother earth. The Declaration did inspire mankind towards peace and international cooperation to protect earth; it, however, gave warning that a point is reached in history when by wise cooperation we can achieve wonders from earth's resources, but a selfish exploitation of mother earth can harm our civilisation to a great extent. The UN Declaration also made a Report entitled 'Only

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One Earth: The Care and Maintenance of a Small Planet Earth'. The Report was written by the great biologist Renee Dubos, and the wonderful economist, Barbara Ward. I recommend all to read this historic report that leaves you in great love with Mother Earth which needs care and protection from humans. I met astronaut Buz Aldrin who walked on the Moon in 1969 with Neil Armstrong in 1984 or so in New Delhi. When asked how Moon was, Aldrin said it was nice to see and walk on the Moon, but there is no better place than our planet earth. So currently, human society all over world is updating environmental use relating to land use, waters, forests, wildlife, habitats, natural resources and lifestyle in general to save Mother Earth and our own civilization. With a positive view of modern science and its applications for human welfare, a new vision is before us to make our Mother Earth healthy and remove the damage done to its parts like rivers, forests and land areas by modern sustainable planning and development. The Presidential Address in Indian Science Congress in 1986 provided the major steps to be taken for sustainable development. The address was delivered by late T.N. Khoshoo then Secretary, MOEF, Government of India. The present writer had interaction with MOEF and we held a national seminar in India International Centre in March 1985 on 'Law, Science and Protection of Environments' that had impact on environmental law.

3 UNESCO's Contribution for Biosphere Protection

After Einstein's demise in 1955, biologist came forth in academic institutions to highlight the deterioration of global environment. UNESCO took lead to call conferences of scientists. In 1968, it held a major conference attended mostly by biologists from Europe, including then USSR. The proceedings of UNESCO conference reflected major issues of biosphere degradation and recommended a new programme for world society to save mother earth called 'Man and the Biosphere Programme or MAB'. To implement MAB, UNESCO established Biosphere Reserves and involved IUCN for protection and conservation of nature. Today it is time to review global MAB work. It will enable global society to judge progress in restoring major components of biosphere like oceans, rivers, forests, wildlife and other biotic species. We can also measure to some degree the sustainability of nature and impact of economic development that has overtaken the nature's balance of laws of nature relating to airspace, landspace, waters, etc. We may proceed to find that global ecological approach to natural resource management is useful tool to manage earth than pure economic growth. We have two eminent scholars discussing this issue of economic growth. Prof. Bagwati from Columbia University is in favour of economic growth that supports views of present Prime Minister supported by the Deputy Chairman Planning Commission. Prof. Amartya Sen from Harvard favours expansion of health and education facilitation for better economic lifestyle. In short, we seek a balance between these important opinions. What matters is conservation of natural resources as some African Government in southern region have recently recommended. Conservation of nature is a big social

awareness movement in India. It also includes new national schemes like Gandhi Rural Regeneration Schemes, Jawaharlal Nehru Urban Development Schemes, etc. Thus, UNESCO has produced a global environment movement that has transformed world order to ecological economics. Global heritage sites are being protected. Wetlands have been declared as protected areas. The future road map seems drawn to protect mother earth. UNESCO also held under Julian Huxley a conference in 1971 on 'Science and Synthesis'. It recommended a biologist view of world order. Ever since, there is a biotechnological revolution in production of foods, medicines, and attempt to look for green sources of energy to avoid global warming by energy sources which produce carbon dioxide leading to global warming.

4 Conclusion

The conference of UNESCO when reviewed today provides a synthesis of all knowledge as the goal is to find the laws of nature and man's harmony with nature. The idea is to comprehend nature and not conquer it by force or human greed. Gandhi has cited again that mother earth has enough for all needs of humans but not for greed and showmanship. Bill Gates says he does not want the political power to help global society. The time is for rich billionaires to help remove global poverty by being saints and sages. Removal of poverty seems the motto of environmental law at macro- and microlevels so that man regains human freedom amid ecological crisis generated by global armaments and associated technology.

Chapter 10

Authority for Protection and Conservation of the Environment: A Judicial Invocation in India

Ali Mehdi

1 Introduction

India is an abode of rich environmental resources that not only offers variant climatic conditions, sacred places of worship, habitat for millions of tribes but also caters to the fast growing development. In the process of development, the most vulnerable victim is the environment. Though religiously and culturally the means and mechanisms to protect and conserve the quantity and quality of the natural resources have been followed in various forms in India in the form of “sin and virtue” and duties, the last quarter of the twentieth century reveals the formulation and implementation of policy and laws focusing on environment for its protection and conservation. The apex court too has shown its serious concern and remarkable contribution to activate the executives for execution of the laws. The Court has come forward and by the process of interpretation and innovation under the caption “complete justice” laid down guidelines and directives to save the environment without impeding the process of development and hindering the progress of people. The government has been reminded of its power and duties toward the environment. The constitution of Central Empowered Committee (CEC), *inter-alia*, is the brain child of the Supreme Court of India. It has assumed a very significant status in the process of forest and environmental clearance and played a vital role in project clearance, having a preferred priority for environment over the profit-oriented priority of the proponents. The present chapter aims at the functions of the various agencies created under the respective laws and the powers and jurisdiction of the CEC and examines its contribution.

In the environment, man and other components of the nature co-exist. Needless to say that the survival of life on the earth depends upon the availability of natural resource which are measured in quality as well as in quantity. Use and exploitation

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of these resources, therefore, require due care. During the period when there was no state-made legislation in India, even then, need to harmonize man–environment relationship was strongly felt. *Dharma*¹ of the individual was the controlling device to check the man's selfish interest in exploiting the resources to one's benefit. India being rich in natural wealth and historically a place of religion, the social behavior and interaction with the environment, therefore, is also guided by the religious instructions. The environmental problems were taken as community problem and, therefore, it was considered as duty to protect and preserve the nature. Rivers in general and certain named rivers in particular were referred to with great reverence.² This notion helped in the cause of preservation of natural resources by exercise of self-restraint without intervention of the state. Moreover, the problem relating to environment was basically a pollution problem caused by the domestic-generated organic wastes and that too at low level confined to the human settlement areas not posing any serious threat to the distantly placed environment in general and so the local area under the reach could be prevented by observing a sense of duty. The other problems relating to environment, viz., deforestation, exploitation of mines and minerals, and depletion of water level by over extraction, were not known, as the use of these resources was need based only and not commercial.

With the industrial development and dilution of the agriculture-based economy demand for the resources increased manifold causing depletion in the quantity and the process of their persistent use further deteriorated the quality of the remaining resources. Even the renewable components of the environment do not sustain the wholesome properties for the ordinary use without facing the potential risks. Survival of human population, vegetation, livestock, and other related materials and the interrelationship among and between them were exposed to disastrous condition and, therefore, the duty concept gave way to "command and control theory", but re-occupied reminiscently in the Constitution of India³ after the Rio Declaration. Indian Parliament invoked less common enabling provisions under the Constitution⁴ to make several laws⁵ for the control and prevention of pollution, protection of the environment and conservation of wild life and the forest. The implementation of so far unknown special laws was assigned to specially created authority/committee/Board.

Under the pollution control laws as well as the resource conservation laws, there are provisions for constitution of the special agencies empowered and entrusted to execute the respective laws. There is no other agency betwixt, whatsoever, to coordinate the functioning of the various authorities. Study of the functional aspect

¹Various religious scriptures.

²P.V. Kane, *History of Dharmashastra*, IV 555, 1974.

³The Indian Constitution, Articles 51A (g), 243G, and 243 W.

⁴*Id.*, Articles 252 and 253.

⁵The Water (Prevention and Control of Pollution) Act, 1974; The Air (Prevention and Control of Pollution) Act, 1981; The Environment (Protection) Act, 1986; The Wild Life Protection Act, 1972; and the Forest Conservation Act, 1980.

of the existing authority or agency under the law in force shall exhibit the insight into merits and the circumscription.

2 Pollution Control Board

The Water (Prevention and Control of Pollution) Act, 1974 was passed to establish agencies by the name of Pollution Control Board at the Centre and state levels for the prevention and control of water pollution caused by release of the toxic trade effluents as wastes generated on account of growth of industries and the domestic wastes out of increasing tendency of the people to move to the city for a better living condition. It, therefore, becomes essential to ensure that the domestic and industrial effluents should not be allowed to be discharged into water course without adequate treatment because the untreated discharges would render the water unsuitable and unfit for drinking and other ordinary uses. Later on the Air (Prevention and Control of Pollution) Act, 1981 was passed to implement the Stockholm Declaration 1972 on the Human Environment for the preservation of the natural resources of the earth, which among other things include the preservation of the quality of air and control of air pollution. This Act also provided for the establishment of Boards to exercise power and perform functions relating to prevention, control, and abatement of air pollution. Since the Boards were already constituted under the Water Act, to avoid setting up an additional authority and expenses, the same Boards were also assigned the powers and functions under the new legislation. Further, under the Environment (Protection) Act, 1986 the central government may delegate its powers of taking measures to protect and improve environment quality as well as to prevent and control the pollution of environment to the authorities constituted under the Act.⁶

The Pollution Control Board is a statutory autonomous body set up at the central and state level following the federal principles but their existence is seemingly at the pleasure of the respective government as it can be superseded on the grounds of persistent default in performance of the functions or in public interest.⁷ Power of the government to supersede the Board in public interest causes shadow over the independent exercise of the powers and performance of the functions under the various Acts. The Board has the various powers with a view to prevent and control environmental pollution including laying down the permissible standards for the emission and discharges of environmental pollutants and the standard for the quality of environment in general and water and air in particular. Its functions and powers are, however, based on examination of the proposal for establishing any industry, process, or operation, and decide accordingly either to give consent or

⁶The Water Act, 1974, section 23.

⁷*Id.*, sections 61, and 62; and the Air Act, 1981, section 47.

refuse. The Board may also impose conditions for compliance by the owner or the occupier or the authority.

The power of the Board, however, is confined to the individual cases and has no power to take into account the cumulative effects, in giving the consent or to withhold it. The Board has the power to initiate criminal proceedings for restraint and prosecution against the violators of the permissible standards and the conditions, if any, imposed on the consent certificate issued at the time of commissioning of the industrial units. The prosecution launched by the Board is precisely regulated by the procedure laid down in the laws. For example, collection of sample is strictly guided by the procedure provided in the respective legislation.⁸ And these laws also point out the effects—if the prescribed procedure is not followed—as the examination report being not-admissible in court of law.⁹ The Board has the administrative capacity to issue mandatory directions to any person, authority, or officer with effect to closure, prohibition, or regulation of any industry or process for the stoppage or prohibition of essential services.¹⁰ These powers aim at only prevention and control of the pollution and help in a limited way toward protection of the environment but to be resorted to in guarded manner.¹¹

A positive obligation¹² to improving the environment quality is beyond the reach of the Pollution Control Board under the law. The scope of the laws being restricted to prevention and control of pollution of air and water, the Board's role is inspectorate in nature. Board has no authority to lay down some action plan with a view to improve the quality of environment. It cannot look into the quantity aspect like scarcity of water in certain areas. The powers vested are only restrictive in nature. The Board has been found failing to perform even its statutory duties.¹³ Powers given to the Boards are not comprehensive enough to examine the overall effects of other projects like the mining and the projects affecting the forest and wildlife-significant components of the environment.

⁸The Water Act, 1974; the Air Act, 1981; and the Environment Act, 1986.

⁹*Delhi Bottling Co Pvt. Ltd v. Central Board for Prevention and Control of Water Pollution* AIR 1986 Del. 152.

¹⁰*Supra* note 6, section 33A; and the Air Act, 1981, section 31A.

¹¹*Chaitanya Pulvarising Industry v. Karnataka State Pollution Control Board* AIR 1987 Karnataka 82.

¹²*Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh* AIR 1985 SC 652 has no reference to the pollution control Board, where in loss of aquifers due to lime stone quarrying in Dehradun-Mussorie area was reported to the apex court.

¹³*Enviro Legal Action v. Union of India* AIR 1996 SC 1446.

3 Advisory Committee Under the Forest (Conservation) Act, 1980

Forest, prior to 42nd Constitution Amendment Act, 1976 was within the domain of the states and, therefore, the state had control over the forest in the respective state territory. The state government was empowered to regulate activities in the classified forests and it had the power to prohibit felling of trees, quarrying and taking of the forest produce there from. Taking into consideration the loss of greenery and its importance to the climate change, wild life, and the people living in and around the forest, the subject of forest was shifted to the concurrent list so that Parliament could after considering the problem in totality enact and constitute an authority to advise the government regarding implementation of the law uniformly all over the territory.

The Forest (Conservation) Act, 1980 stands against deforestation causing ecological imbalance and provides for conservation of the forest and restricts use of forest lands for non-forest purposes.¹⁴ The amended Act¹⁵ lays down that the state government shall not, except with the prior approval of the central government, make order for, de-reserving the reserved forest, transforming forest land use into non-forest purpose, transferring any forest land to an entity not owned or controlled by the government, and felling of trees naturally grown in forest land. Section 3 of the Act provides for the constitution of the Forest Advisory Committee (FAC) entrusted with the power to examine the proposal of any user agency well in advance of taking up any non-forest activity on the forest land. The FAC may advise grant of approval for non-forest purpose or with respect to any other matter connected with the conservation of forest. Thus, the object of the Act is twofolds: first, restrictions on use of forest land and, second, constitution of an advisory committee to advise the central government. The government may refer and seek the advice with respect to all or any of the following matters;

- i. Whether the forests land proposed to be used for non-forest purpose forms part of reserved forests, national park, wildlife sanctuary, biosphere reserve, or forms part of the habitat of any endangered or threatened species of flora and fauna;
- ii. Whether the use of any forest land is for agricultural purposes or for the rehabilitation of persons displaced from their natural habitat;
- iii. Whether there are no other alternatives in the circumstances; and
- iv. Whether the state government or the other authority undertakes to provide at its cost for the acquisition of land of an equivalent area and afforestation thereof.

¹⁴The Forest (Conservation) Act, 1980, section 2.

¹⁵As amended in 1988.

While tendering the advice, the Committee may also suggest any conditions or restrictions on the use of any forest land for any non-forest purpose, which in its opinion would minimize the adverse environmental impact. On a proposal from the state government of Orissa, FAC recommended with stipulation certain conditions such as speedy reclamation of the area of mining, minimum loss of greenery, and modified plan for the wild life.¹⁶

The central government shall, after considering the advice of the Committee and having any further enquiry,¹⁷ if any, as it may consider necessary, grant approval to the proposal with or without conditions or reject the same within sixty days of its receipt.¹⁸ The decision of the central government is expected to be based on rational and cogent grounds keeping in view the principle of sustainable development. The court has, nonetheless, space to intervene in the matter to examine the viability of the project and its harmony with the connected forest area.

4 Authority Under the Environment (Protection) Act, 1986

The central government has been given extensive powers under Environment Act to protect and improve the environment and prevent human beings, other living creatures, plants and property from the hazards. One of such powers, in order to accomplish the objects, relates to constitution of authority/authorities and delegation of the powers and functions to the authority.¹⁹ Though the Act came into effect in May 1986, the government could neither visualize nor consider it desirable to constitute the authority and empowering it to take measures toward protection of the environment until the Supreme Court of India pointed out and observed the significance of the power of the government for setting up of the authority.²⁰ The Court directed the government to realize its responsibility and statutory duty to protect the degrading environment of the country on account of massive destruction of the natural resources and pollution of the environment. The court directed the government to constitute an authority under section 3(3) of the Act with the powers necessary to deal with the situation created by the tanneries and other industries in

¹⁶In February, 2005 a proposal for Bauxite Mining in Kalahandi and Rayagada Districts of Orissa was forwarded by the Government and the same was approved in 2008.

¹⁷FAC in 2010 recommended that a special committee be constituted to examine the issues relating to violation of tribal rights under the Forest Dwellers Act, 2006. And finally the FAC found significant evidence of *prima facie* violations of the laws: Forest Rights Act, Forest Conservation Act, and Environment Protection Act and noted that any clearance of the project would be in contravention of the laws.

¹⁸G.S.R. 23(E), 2003.

¹⁹The Environment (Protection) Act, 1986, section 3(3).

²⁰*Vellore Citizens Welfare Forum v. UOI AIR 1996 SC 2715, 2724.*

the state of Tamil Nadu.²¹ The committee so constituted, however, had the members preferably with the expertise in the field of pollution control and environmental protection, presided over by a retired judge of the High Court. The Authority had also guidelines issued by the court to implement the “*precautionary and polluter pays principles*” in assessing the damages caused by the polluting industries.

Such authority/authorities have been created through judicial invocation in some other subsequent cases.²² The Authorities so created have facilitated the proper implementation of the powers of the central government²³ as well as monitoring of the execution of judicial orders. Such authority may also enforce certain anthropocentric environmental principles developed through the international declarations and introduced in the Indian environmental jurisprudence by the apex court, i.e., “*precautionary principle and polluter pays principles*”.²⁴ The advantage of such authority has been toward precise and real execution of the government’s power and the court’s directions. The government officials not being specialized in such area, the power so vested lies only in the statute book merely as assertion of powers to prevent and improve the environment that seems vague, wide-spread instead of focused one. The authorities so created have the expertise and experience to execute such powers and orders. Consequently, the respective authority has come out with remarkable and noteworthy results.²⁵ Such authority had definite terms of reference and so worked like the ad hoc body and ended after the assigned work was satisfactorily over.

Another significant feature of section 3(3) of the Act is that number of authorities depending upon the need and peculiarity of the problem may be created with a different title suggesting semblance with the work to be done. The provision is, therefore, very flexible and has very wide scope justifying the nick name “umbrella legislation” by which the Environment Act is usually known. Through these authorities, the government can conveniently and effectively implement the Act. Soon after the Act came into force, foreseeing the kind of problem, constitution of an authority named National Environment Protection Authority (NEPA), was rightly suggested.²⁶ But it could not be materialized perhaps the government could not foresee the usefulness of such authority unless

²¹Ibid.

²²A.P. Pollution Control Board v. M V Nayudu AIR 1999 SC 812; S. Jagannath v. UOI AIR 19,997 SC 811; M. C. Mehta v. UOI AIR 1998 SC 617; Sector 14 Residents Welfare Association v. State of Delhi AIR 1999 SC 308, M.C. Mehta v. UOI AIR 2002 SC (supp) 1696.

²³It may exercise powers vested in central government under sections 3 and 5 of the Act.

²⁴Supra note 17.

²⁵Supra note 19.

²⁶Upendra Baxi, “Environment Protection Act: An Agenda for Implementation”, 15, 1987; NEPA be constituted by collegiums comprising about twenty people selected on the participatory basis from eminent citizens, scientist, social activists in the field of environment, representatives from labor industry, consumer and women group and officials. It should be an autonomous body under the Act.

the court read the same into the provisions and thought over the suitable mechanism to achieve the object of the law.

The environment being receptacle of all the pollutants has also been losing its natural identity on account of serious assault by consistently uncontrolled and illegal felling of trees and exploitation of the natural resources in the name of extraction of mines and minerals in the fragile zones, particularly state of Goa, Andhra Pradesh, Karnataka, and Orissa. The illegal mining has become story of the day. Supreme Court concerned with the rampant pilferage of the trees in the forest and illegal extraction of the natural wealth and resources, particularly iron ore, and the environmental degradation and disaster that may result from such intrusion into the fragile area, felt compelled to intervene further in the absence of any perceptible efforts on part of the government. The government rather found to be a silent observer of such tragic and irreparable loss of the resources.

The Supreme Court of India in its desperate efforts to control the destruction of the forest and the environment, in general, considered appropriate constitution of an autonomous and impartial standing committee that could monitor the proper implementation of its order. In *T.N. Godavarman Thirumalpad v. Union of India*²⁷ vide its order, dated September 9, 2002 in an Interlocutory Application, the Supreme Court constituted a Central Empowered Committee (CEC) to examine and monitor the various activities in violation of the laws relating to the environment and also to suggest the preventive or punitive steps that might be required necessarily to protect the environment. In addition to expression of general concern for the environment, the court also took note of the violations of its orders and directed that the CEC shall monitor implementation of all orders of the Court and place before it any unresolved cases of noncompliance, including in respect of the encroachments, removals, implementations of working plans, compensatory a forestation, plantations, and other conservation issues. The CEC constituted by the Court was proposed to be converted into a Statutory Committee. In furtherance to the said order, the government, therefore, framed a notification under the provisions of section 3(3) of the Environment Protection Act, 1986 for constitution of CEC²⁸ for the purposes of monitoring and ensuring compliance of the orders of the Supreme Court with reference to the subject matter of the forests and wildlife, and related issues arising out of the said orders. The Notification issued for constitution of the Committee in pursuance of the Supreme Court's order was remarkably different from the usual practice followed by the set up of the committees. It contained names of the five members to act as committee for a period of 5 years. The members belong to the field of environment but bureaucrats with one member having knowledge of law. It is noticeable that the government did exercise the power under section 3(3) of the Environment Act but simply notified the CEC as directed by the court in its order.²⁹ This suggests on one hand the active and

²⁷AIR 1997 SC 1228.

²⁸SO 1008 (E), September 17, 2002.

²⁹*T.N. Godavarman Thirumalpad v. Union of India*, decided on 9th September, 2002.

dynamic role of the court and the casual and remotely concerned attitude of the executive on the other hand. The Committee comprises five members and has the following powers and functions³⁰: (i) to monitor implementation of the Court's orders and submit reports of noncompliance before the Court including in respect of encroachments removals, working plans, compensatory a forestation, plantations, and other conservation issues; (ii) to examine pending interlocutory applications in the said writ petitions³¹ (as may be referred to it by the court) and place its recommendations before the court; (iii) to hear applications filed by any aggrieved person seeking relief against any action taken by the government or any other authority purportedly in compliance of the orders passed by the Supreme Court or against any action of any person or body or agency in violation of such orders, and to dispose of such applications in conformity with the orders of the court that otherwise cannot be appropriately disposed of; and (iv) without prejudice to the generality of the powers conferred upon the Committee under the provisions of the Environment Act, for the purpose of effective discharge of its functions, the Committee shall have the powers to (a) call for any documents from any person or the government of the Union or the State or any other official; (b) summon any person and receive evidence from such person either on affidavit or otherwise; (c) seek assistance or presence of any person or official required by it in relation to its work; and (d) decide its own procedure for dealing with applications and other issues.

Committee is required to submit quarterly reports to the court. It has been submitting the report in course of time particularly, about the irregularities and illegalities coupled with criminality to the notice of the Court.³² The CEC in discharge of its functions and responsibilities has examined the matters, notably in the state-rich in minerals. These violations have come to the surface as a result of enquiries conducted by the CEC regarding illegal mining and the licensed mining but beyond their leased areas by the licensees/lessees companies. It was pointed by the CEC with special reference to such companies that there was not only illegal extraction of iron ores but the minerals being also extracted beyond the leased area specified in the lease deeds. Further, there was unchecked export of iron ore from the border areas of the states, namely, Andhra Pradesh and Karnataka. Such activities involved multiple issues like the quantum, quality, and transportation of the ores as well. The CEC pointed out illegalities, irregularities, and instances of misuse of public office for the benefit of few at the cost of irreparable environmental damages pertaining to various projects. The CEC is under obligation to report the Court rightly without exception, and as a matter of fact, all relevant issues that may have some bearing pertaining to the environment,³³ affected by the pollution,

³⁰Supra note 19, section 2.

³¹Supra note 28.

³²States of Andhra Pradesh, Karnataka, Goa, and Odisha.

³³The Environment Act, 1986, section 3(3).

environmental clearance, and clearance for the diversion of forests for non-forest purposes.

The primary function and responsibility of CEC thus appears to be to report the court on various matters relating to illegal and irregular activities that were being carried on by the various persons affecting ecology, environment, and reserved forests in different parts of the country. The status of the CEC is not a body discharging quasi-judicial or even administrative functions,³⁴ with a view to determine any of the rights of the parties,³⁵ i.e., it cannot ascertain the rights of person but only report the court the facts as existing. Its role is in the nature of fact-finding body not vested with the power of investigation in the manner as understood under the Criminal Procedure Code, 1973.³⁶ Such position authorizes the Committee to examine, as per its own satisfaction the procedure to be observed in the prevailing circumstances in the matters under reference, taking into consideration the site, vulnerability of the ecosystem, the rights of the people³⁷ residing in and around the area, and the viability of the project in terms of quantity of the minerals and ores.

5 International Instrument

India is a fast growing country toward the developmental goal in terms of the fulfillment of needs of the people, availability of knowledge, and abundance of natural resources; however, it is equally concerned for the conservation of the resources and protection of the environment. It has marked its presence at the international forum too and responded to such international commitment as a responsible nation. The response can be noted in the field of legislation, policy framing, plan layout, and also the judicial decisions. Creation of such authority is in alignment with the Principle 17 of the United Nation Declaration, 1972³⁸ (*Magna Carta* of environmental law), that states “*national institutions* must be entrusted with the task of planning, managing or controlling the environmental resources of states with the view to enhancing environmental quality”. Further in order to protect the global climate and recognizing climate change, a common concern of mankind, the Hague Declaration, 1989 lays down, “The principle of developing, within the framework of the United Nations, *new institutional authority, either by strengthening existing institutions or by creating a new institution*, which in the context of

³⁴Supra note 28, Clause 2 (II) provides for the power to issue administrative direction to the recalcitrant.

³⁵*Samaj Parivartan Samudaya v. State of Karnataka* AIR 2012 SC 2326.

³⁶Ibid.

³⁷The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

³⁸The Stockholm Declaration on Human Environment, 1972.

the preservation of the earth's atmosphere, shall be responsible for combating any further global warming of the atmosphere and shall involve such decision making procedures as may be effective..." (Emphasis added). Creation of the authority under the direction of the apex court is also in consonance to with the International instruments which the government responded late.

6 Conclusion

The CEC owes its existence primarily to a judicial order and subsequently central government's notification. The relevant notification does also refer to the Court's order in laying down the object, powers, and functions of CEC. Such reference highlights the predominant role of the Indian Supreme Court in awakening the government from slumber and activating for the protection of the environment. The Court also seems a bit concern over the fate of the execution of its order that falls within the executive domain and, therefore, sets up CEC to monitor the proper implementation of the laws and directions. CEC though functions under the control of the government but is accountable to the apex court. It has meaningful role to play in the form of a fact-finding body to oversee the observance of law, entertaining the complaint of the aggrieved persons in compliance of the Court's order, and making recommendations to the Court. The recommendations of CEC have been the basis for stoppage of mining operations in the states of Andhra Pradesh, Goa, Karnataka, and Odisha.

Thus, it can be said that CEC is an important institution suggested and created by the court. It has got plenary power to help conserve the natural resources and has the potentiality to dominate over the other authority set up under the other enactments and reinforces the opinion that the judiciary amongst the organs of the state gets the driving seat in the matters of environment in India. The legislatures, therefore, should come forward to enact a single law for setting up an authority to exercise all the powers comprehensively for the protection and improvement of the environment and conservation of the resources. The judicial invocation and incorporation of such order in government's notification through section 3(3) of the Environment Act, 1986 seems to be an ad hoc and emergency measure for the time being and is not a solution to the growing serious concerns that can be better dealt with a standing parent Act.

Chapter 11

Human Right to Water and National Water Policy-2012: Emerging Issues

Vinod Shankar Mishra

1 Introduction

For the present work, the four cardinal principles suggested by the International Conference on Water and Environment 1992 at Dublin may be worth quoting. First, ‘fresh water is a finite and vulnerable resource, essential to sustain life, development, and the environment’. Second, ‘water development and management should be based on a participatory approach involving users, planners, and policy makers at all levels’. Third, it must be fully acknowledged that ‘women play a central part in the provision, management, and safeguarding water’. Fourth, ‘water has an economic value in all its competing uses and should be regarded as an economic good’.

Professor Baxi has pointed out that it is discomforting for an activist heart, surely including mine, to say upfront that the current World Bank and GATS-based approach elevates the fourth over all other Dublin principles.¹

According to Secretary General of the United Nations Ban Ki-moon, ‘The problem is that we have no coordinated global management authority in the U.N. system or the world at large. There is no overall responsibility, accountability or vision for how to address the related problems of climate change, agricultural stress and water technology’. The World Economic Forum’s effort to develop the economic and geopolitical forecast on water is essential.²

India is also under intense pressure to reform its water sector. In fact, the World Bank has been a key player in India, working behind the scenes in building

¹Upendra Baxi, “The Human Right to Water: Policies and Rights”, in Ramaswamy R. Iyer (ed.), *Water and the Laws in India*, 2009, pp. 159–160.

²Shiney Varghese, ‘Turning off the tap on water as a human right’, available at <http://www.thehindu.com/opinion/op-ed/turning-off-the-tap-on-water-as-a-human-right/article2897312.ece>, [accessed on 16 February 2012].

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consensus over water policy reform both at the Centre and in the states. In many cases, these reforms promote as a single model the commoditization of water, creating institutional and legal structures conducive to greater involvement of the private sector in the provision of water services, corporatisation of state providers and the implementation of full cost recovery principles. As a result, there has been a change in the focus of the state as a provider of water for all citizens to distant facilitator or regulator.³

The Standing Committee on Water Resources (2011–12) had urged the government to initiate steps in the right earnest to strive to build national consensus to bring water either in the Union List or in the Concurrent List after due consultation with the state governments so that a comprehensive national plan of action is evolved for water conservation, development, exploitation and equitable distribution in the larger and long-term national interest. The Committee had recommended that the draft proposal in this regard be initiated by the Ministry (Water Resources) expeditiously.⁴

The Central Government constituted a Committee on Allocation of Natural Resources (CANR) under the chairmanship of Shri Ashok Chawla *vide* order dated 31 January 2011. The Committee submitted its report on 31 May 2011. The Committee *inter-alia* recommended that there is an urgent need to have a comprehensive national legislation on water. This can be done either through bringing water under the concurrent list and then framing the appropriate legislation; or by obtaining consensus from a majority of the states that such a ‘framework law’ is necessary and desirable as a Union enactment. The legal options in this regard need to be examined by the Ministry of Water Resources. The national legislation should clarify a common position on a number of issues, e.g. need to consider all water resources as conjunctive, unified whole; water as a common property resource; principles of allocations and pricing and so on. The framework legislation should recognize that pollution also leads to conjunctive use of water, which makes the resources unusable for other purposes. The recommendations of CANR have been referred to a Group of Ministers.⁵ However, this report has not yet been implemented in letter and spirit.⁶

³Philippe Cullet and Roopa Madhav, “Water Law Reforms in India: Trends and Prospects”, in Ramaswamy R. Iyer (ed.), *Water and the Laws in India*, 2009, at 527.

⁴The Standing Committee on Water Resources (2011–2012) Fifteenth Lok Sabha Ministry of Water Resources Augmentation of Depleted Ground Water Level, Sustainable Development, Conservation, Management, use of Ground Water and Prevention of Water Pollution [Action Taken by the Government on the Recommendations/ Observations contained in the Tenth Report (Fifteenth Lok Sabha) of the Standing Committee on Water Resources] Twelfth Report Lok Sabha Secretariat March 2012, available at [http://bcity.in/system/document_uploads/86/original/Repair_Renovation_and_Restoration_of_Water_Bodies\(NLCP\).pdf?1369155048](http://bcity.in/system/document_uploads/86/original/Repair_Renovation_and_Restoration_of_Water_Bodies(NLCP).pdf?1369155048), [accessed on 16 February 2012].

⁵*Ibid.*

⁶The Ashok Chawla Committee report is stuck on account of stiff opposition to reform by certain ministries who wish to retain their discretionary power in the allocation of natural resources. See generally, A news item published in *the Hindu* dated 4 May 2012. (Shalini Singh, ‘Government

Bringing water under Central control was discussed at a Planning Commission meet in April, 2011 to formulate the 12th Five-Year Plan. It suggested water law on the lines of the European Union where water is under one of the directives.

This chapter explores existing National Water Policy, 2012 which is related to regulation and control of water as a natural resource and economic good. Who will control water and how will it be allocated? In this chapter, an attempt is made to critically examine the role of state as a trustee of natural resources including water resources. The present work also takes into account Draft National Water Framework Bill, 2013. Right to water has been declared as a fundamental right by the Supreme Court of India. The Present policy makes a negative impact on this neo-fundamental right. Will the National Water Framework Bill, 2013 promote enjoyment of right to water as a fundamental right or will it become an effective tool for oppression and exploitation of marginalized/weaker sections of society?

2 Legal Recognition of Right to Water

The right to water dates back to the *Mar Del Plata* Action Plan that emerged from the UN Conference on Water in 1977; there is not yet a global human rights treaty⁷ establishing this right in explicit and universal terms.⁸ The right to water requires that all persons have affordable access to a supply of safe water in quantities⁹ adequate for essential personal and domestic uses, which include drinking, sanitation, washing of clothes, food preparation, and personal and household hygiene.¹⁰

Article 25 of the Universal Declaration of Human Rights also says water is the single most important element needed to achieve the universal human right to a

(Footnote 6 continued)

Keeps Chawala report, Mining Act review from the Supreme Court). The said newspaper (*The Hindu*) dated 4 May 2012 states that the fate of Ashok Chawla Committee report on allocation of natural resources suggests a wider government unwillingness to accept competitive bidding auctions and market linked auction for scarce, natural resources lies at the heart of its 2G (*Public Interest Litigation and others v. Union of India and others*) available at <http://supremecourtofindia.nic.in/outtoday/39041.pdf> [accessed on 8 February 2012].

⁷Almost all nations have endorsed non-binding political declarations that mention the right to water, such as the Programme of Action of the 1994 Cairo Conference on Population and Development, endorsed by 177 states; Dr. David Boyd, "The Right to Water: A Briefing note", available at: <http://www.interactioncouncil.org/right-water-briefing-note>, [accessed on 16 February 2012].

⁸*Ibid.*

⁹An adequate supply requires a minimum of 50 to 100 L per person per day. See generally G. Howard and J. Bartram, *Domestic Water Quantity, Service, Level and Health*, 2003, World Health Organization, Geneva; P.H. Gleick, "Basic Water Requirements for Human Activities: Meeting Basic Needs", 21 *Water International*, 2003, at 83.

¹⁰UN Committee on Economic, Social, and Cultural Rights, 2003, *General Comment No. 15: The Right to Water*, UN Doc. E/C.12/2002/11, available at <http://www.refworld.org/docid/4538838d11.html>, [accessed on August 10, 2013].

standard of living adequate for the health and well-being of himself and his family¹¹ as guaranteed under Article 25 of the UDHR. Recognition of the right to water requires states to respect, protect, and fulfil the right. Respecting the right requires states to refrain from interfering directly or indirectly with the right. Protecting the right means ensuring that third parties do not interfere with or violate the right (e.g. through legislation preventing water pollution). Fulfilling the right requires positive state action—such as investment in water treatment and distribution infrastructure—to ensure that the right is universally enjoyed.¹²

At the close of the 29th session on 26 November 2002, the United Nations Committee on Economic, Social, and Cultural Rights issued General comment No. 15 of 2002 which declared: ‘water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a pre-requisite for the realization of other human rights’. The committee went on to define this right as under:

The human right to water entitled every one to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use; An adequate amount of safe water is necessary to prevent death from dehydration, to produce for consumption, cooking, personal and domestic hygienic requirements¹³

The right to water is not explicitly included in the Universal Declaration of Human Rights or the International Covenant on Economic, Social, and Cultural Rights (ICESCR). However, implicit rights to water and sanitation are arguably included in article 25 of the Universal Declaration (the right to a standard of living adequate for the health and well-being of himself and of his family) and articles 11 and 12 (the rights to an adequate standard of living and health) of the ICESCR.¹⁴

¹¹According to a report of C. Ramachandraiah of the Centre for Economic and Social Studies, Hyderabad, about 226 million people lack access to safe water. The water-related diseases are claiming the lives of about 1.5 million children (5,00,000 children due to diarrhoea alone) under five years of age. According to World Water Council, all have a right to water, but more than 1.2 billion in the world do not have access to water. Even among those who have access to drinking water, only a small proportion seems to be enjoying continuous organized water supply through taps for 24 h in a day. Due to lack of organized water supply through surface water resources in many areas of the globe, groundwater is being over-exploited, resulting in groundwater falling to inaccessible depths in many areas; Binay Singh, ‘Right to safe, adequate water mere lip service’, available at http://articles.timesofindia.indiatimes.com/2009-04-27/varanasi/27998167_1_drinking-water-water-supply-water-crisis, TNN 27 April 2009.

¹²C. de Albuquerque, *The Human Right to Water and Sanitation: Frequently Asked Questions*, 2010, Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation. Geneva: Office of the UN High Commissioner for Human Rights. See also, Dr. David Boyd, “The Right to Water: A Briefing note”, available at: <http://www.interactioncouncil.org/right-water-briefing-note>.

¹³Economic and Social Council, E/C.12/2002/11, 2003, available at [http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1dbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1dbd713fc1256cc400389e94/$FILE/G0340229.pdf), [accessed on 10 September 2013].

¹⁴UN Committee on Economic, Social, and Cultural Rights, 2003, *General Comment No. 15: The Right to Water*, UN Doc. E/C.12/2002/11. available at <http://www.refworld.org/docid/4538838d11.html> [accessed on 10 August 2013].

The General Comment is a device that has been used by the United Nations from time to time to amplify the rights set out in its covenants. The UN Committee found a ‘widespread denial of the right to water in developing as well as developed countries’. It cited ‘continuing contamination, depletion and unequal distribution of water, as exacerbating existing poverty’. It called upon the state parties to the covenant to adopt effective measures to realize the right to water.

Acknowledging the fact that water is not expressly mentioned in the UN Covenant on Economic, Social and Cultural Rights, the committee sought to justify its stand as under Article 11 of the Covenant [International Covenant on Economic, Social, and Cultural Rights (ICESCR)] enumerates a number of rights emanating from and indispensable for the realization of the right to an adequate standard of living ‘including adequate food, clothing, and housing’. The use of the word ‘including’ indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living particularly since it is one of the most fundamental conditions for survival. Moreover, the committee previously recognized that water is human right contained in Art. 11 paragraph 1.¹⁵

According to UN committee, the principal elements of right to water are availability, quality and accessibility. Supply must be sufficient for regular, personal and domestic use including drinking, sanitation, food preparation and personal and household hygiene. An earlier General Comment published by the Committee on Economic, Social and Cultural Rights confirmed that governments have a core obligation to ensure the satisfaction of, at the very least, ‘minimum essential levels’ of each of the rights enunciated in the International Covenant on Economic, Social, and Cultural Rights.¹⁶ Under no circumstances shall an individual be deprived of the minimum essential level of water.¹⁷

¹⁵The economic, social and cultural rights of older persons, 12/08/1995; CESCR General comment 6 (General Comments) available at <http://www.unhchr.ch/tbs/doc.nsf/0/482a0aced8049067c12563ed005acf9e>, [accessed on 10 September 2013].

¹⁶UN Committee on Economic, Social and Cultural Rights, 1990; *General Comment No. 3: The Nature of states Parties' Obligations*, E/1991/23.

¹⁷Explicit reference to the right to water has been made in two International Conventions, viz. Convention on the Elimination of Discrimination against Women (1979), Convention on the Rights of the Child (1989) and also in one of the regional instruments, i.e. the African Charter on the Rights and Welfare of the Child (1990). Article 14 provides that state parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from development and, in particular shall ensure to women the right to enjoy adequate living conditions particularly in relation to housing, sanitation, electricity and water supply, transport and communication. Article 24 (1) of right of child provides that state parties recognize the right of the child to the enjoyment of the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health. Article 24(2) provides that state parties shall pursue full implementation of this right and in particular, shall take appropriate measures to combat diseases and malnutrition including within the framework of primary health care, through inter-alia the application of the readily available technology and through the provision of adequate nutritious foods and clean drinking water taking into consideration the dangers and risks of environmental pollution.

Against this background, the UN General Comment on water, with its detailed provisions on the practical application of the principles of equitable access, will be a useful tool against which civil society and the judiciary can measure the actions of the legislative and executive branches of the government.

In 2007, the UN High Commissioner for Human Rights concluded ‘that it is now time to consider access to safe drinking water and sanitation as a human right [necessary] to sustain life and health’.¹⁸ In 2010, the UN General Assembly passed a resolution recognizing the right to water,¹⁹ with 124 nations voting in favour, none against, and 41 nations abstaining. The resolution stated ‘the right to safe and clean drinking water is a human right that is essential for the full enjoyment of life and all human rights’.²⁰

At the national level, the right to water has also gained constitutional recognition.²¹ Constitutional provisions explicitly requiring the protection and/or provision of clean water are found in at least 17 nations²² and are increasingly prevalent in new constitutions.²³

Only three postcolonial Constitutions provide explicitly for Human Rights for Water (Uganda 1995; South Africa 1996; Ecuador 1998), and 13 Constitutions provide for specific explicit obligations (Cambodia 1995; Colombia 1991; Eritrea 1997; Ethiopia 1995; Guyana 1980; The Gambia 1996; Iran 1979; Laos 1991; Mexico 1927; Nigeria 1999; Panama 1994; Venezuela 1999; Namibia 1996).²⁴

¹⁸United Nations High Commissioner for Human Rights, 2007; *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*. Annual Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/6/3.

¹⁹The UN General Assembly resolution on the right to water has already had a demonstrable effect. In January 2011, the Botswana Court of Appeal relied on the resolution in ruling that the constitutional rights of the Bushmen of the Kalahari were being violated by the government’s refusal to allow them to access a water source within a wildlife reserve where they resided. *Matsipane Mosethanyane v. Attorney General* (2011), No CACLB-074-10, 27 January 2011, Court of Appeal.

²⁰UN General Assembly, 2010; *The Human Right to Water and Sanitation*, 26 July 2010, /64/L.63/Rev.1.

²¹M. Langford, A. Khalfan, C. Fairstein and H. Jones, “Legal Resources for the Right to Water: International and National Standards”, *Centre on Housing Rights and Evictions*, Geneva, 2004.

²²Bolivia (Article 16(I)) Colombia (Article 366), the Democratic Republic of Congo (Article 48), Dominican Republic (Articles 15 and 61), Ecuador (Article 12), Ethiopia (Article 90(1)), Gambia (Article 216(4)), Kenya (Article 43(1)(d)), the Maldives (Article 23), Panama (Articles 110 and 118), South Africa (Article 27), Swaziland (Article 215), Switzerland (Article 76), Uganda (Articles XIV(b) and XXI), Uruguay (Article 47), Venezuela (Articles 127 and 304), and Zambia (Article 112(d)). See R. Wolfrum and R. Grote, (eds.) G.H. Flanz, and Ed. Emeritus, *Constitutions of the Countries of the World* (Oceana Law, New York, 2011).

²³The Dominican Republic and Kenya enacted new constitutions in 2010 that recognize the right to water. Dominican republic (Articles 15 and 61), Kenya (Article 43(1)(d)).

²⁴See the excellent survey undertaken by COHRE: Centre for Housing Rights and Evictions, Right to Water Program, January 2004.

The much-vaunted and frequently amended Indian Constitution features nowhere significantly, either in terms of explicit guarantees or as entailing any implicit obligations for providing any just Human Right to Water (HRTW) regime. Surely, we should at least ask why this is the case? Says Professor Baxi.²⁵

A constitutional rights-based approach to ‘water governance’ provides a more secure human rights niche than that offered by public contestation over national enunciations of this or that water policy regime. Additionally, it would also secure a more democratic foundation for responsible practices of judicial activism, Indian style.²⁶

The 1999 Venezuela Constitution remains admirable for the reason that it reincarnates, through Article 127, the ‘right and duty of each generation to maintain the environment for their own benefit and for the benefit of the future would’ (emphasis added) and prescribes a fundamental duty of the state ‘along with the active participation of society, to guarantee that the population develops in an environment free from pollution, where the air, the water, the soil, the coasts, the climate and the ozone layer and all living species are particularly protected according to the law’. Further, Article 184 [2] mandates:

The participation of the community and citizens, through local associations and non-governmental organizations, in the formulations of investment proposals before governmental bodies in charge of the elaboration the respective investment plant, as well as in the implementation, evaluation and control of works, social production, and public utilities within their jurisdiction.²⁷

Section 3 of the South African National Water Act, 1998 enunciates the doctrine of ‘public trusteeship of nation’s water resources’. This, at least normatively, obligates the ‘National Government’ to so act as to ‘ensure water is protected, used, developed, conserved, managed and controlled in a sustainable manner, for the benefit of all persons and in accordance with its constitutional mandate’.²⁸

It has been said that water is a human right that does not mean that it should be free, any more than health care is free. Charging a price for water that reflects its full costs is justifiable on grounds of ecology, equity and efficiency, subject to the imperative of providing a basic quantity of free or subsidized water for economically disadvantaged communities and individuals.²⁹ All these developments at the international level have provided the impetus for a formulation of National Water Policy in India.

²⁵Upendra Baxi, *supra* note 1, at 161.

²⁶*Id.*, at 163.

²⁷*Ibid.*

²⁸*Ibid.*

²⁹David Boyd, *Supra* note 7.

3 National Water Policy and Need for Reform

Though we have made law for utilization of water resources since 1873, even today there exists no competent statutory authority for formulating the water policy.³⁰ The state has of course some important roles to play in relation to water, and it must be enabled to play them. It has to legislate on water; protect water source and systems; promote resource conservation; ensure fairness and social justice; regulate the use of water from diverse sources; where necessary, undertake the provision of the ‘water infrastructure’, prevent or resolve conflicts; oversee quality; enter into treaties or agreements with neighbouring countries over common river systems; and so on. In order to enable it to do all this, its role in relation to water has to be defined by law. If ‘eminent domain’ were to be given up, what can we put in its place?³¹

By the 1980s, the lack of a national policy on water was a major impediment to the development of a coherent set of policies on water at the state and national levels. This led to the development of the Water Policy, 1987. The rapidly deteriorating water scenario and the significant economic policy changes that occurred throughout the 1990s led to the reformulation of the water policy in 2002.³²

The key differences between the two policy documents are that the 2002 policy focuses on the development of an improved institutional framework with a focus on improving the performance of the institutions, promotion of rehabilitation schemes for the displaced, enhancing participation by private parties in water management, creating an effective monitoring system, and ensuring that states share the waters of a joint river.

The national policy has been supplemented by the adoption of a number of state water policies.³³ The national and state policies are based on a set of principles that are broadly similar. First, the emphasis is on water as a natural or economic resource that can be harnessed to foster the productive capacity of the economy, from irrigation water for agricultural production to water for hydropower. Second, policies tend to introduce prioritization of water uses. Several of the policies provide that water should be allocated in the following order: drinking water, irrigation, hydropower, ecology, agro-industries and non-agricultural industries, navigation and other uses.³⁴ There is a clear emphasis on domestic uses of water as

³⁰Philippe Cullet and Roopa Madhav, *supra* note 3, at 512.

³¹Ramaswamy R. Iyer, Legal Inadequacies and Perplexities in Ramaswamy R. Iyer “Towards Water Wisdom, Limits, Justice, Harmony”, 2007, at 156.

³²The National Water Policy, 1987, available at <http://www.ielrc.org/content/e8701.pdf> and National Water Policy, 2002, available at: <http://www.ielrc.org/content/e0210.pdf>, [accessed on 20 September 2013].

³³See, for example, Rajasthan state Water Policy, 1999, available at <http://www.ielrc.org/content/e9903.pdf>; Uttar Pradesh Water Policy, 1999, available at <http://www.ielrc.org/content/e9904.pdf>, and Maharashtra state Water Policy, 2003, available at <http://www.ielrc.org/content/e0306.pdf> [accessed on 20 September 2013].

³⁴See, for example, the National Water Policy, 2002, section 5 and the Rajasthan state Water Policy, 1999, section 8.

the overriding priority in water allocation. Nevertheless, several of these policies also provide that this priority list can be changed if circumstances so require, thus ensuring that there is in fact little substance in the prioritization.³⁵

Third, policies generally provide that ‘beneficiaries and other stakeholders’ should be involved from the project planning stage.³⁶ The most noteworthy aspect of the participatory provisions of recent water policies is that they seek to link participation with decentralization.³⁷ Fourth, recent water policies generally promote the use of ‘incentives’ to ensure that water is used ‘more efficiently and productively’.³⁸ The main consequence that is derived from this is the call for private-sector involvement in all aspects of water control and use, from planning to development and administration of water resources projects.³⁹ An area that is singled out for private-sector participation is urban water supply.⁴⁰

Fifth, water policies propose the introduction of water rights. Water-related rights are not new per se, and there is already a vast corpus of law related to control over water. These policies try to do two different things. On the one hand, some policies restate the proposition that the state will allocate water resources.⁴¹ On the other hand, policies propose the creation of water rights in favour of users.⁴² These rights are said to be the necessary premise for participation in the management of water resources, for the setting up of water user associations and for the introduction of trading in entitlements. Trading is specifically proposed in certain policies.⁴³

Finally, the policies seek the introduction of wide-ranging legal and institutional reforms.⁴⁴ These include the introduction of various amendments to existing laws as well as the introduction of new laws. Three main aspects are singled out. These are the introduction of a legal framework for the formation of Water User Associations (WUAs) to decentralize water governance; the introduction of laws providing for the establishment of water resources, existing irrigation and other water resource departments, and the regulations of groundwater.⁴⁵

³⁵See, for example, the Maharashtra state Water Policy, 2003, section 4 and the Rajasthan state Water Policy, 1999, section 8.

³⁶See, for example, the National Water Policy, 2002, section 6(8).

³⁷Philippe Cullet and Roopa Madhav, *Supra* note 3 at 514.

³⁸See, for example, the Maharashtra state Water Policy, 2003, section 1 (3).

³⁹See, for example, the National Water Policy, 2002, section 13.

⁴⁰See for example, the Rajasthan state Water Policy, 1999, section 9.

⁴¹See for example, the Orissa state Water Policy, 2007, section 1.2, 2.2. See also, the Jharkhand state Water Policy, 2011 which states that the state will restructure the fundamental roles and relationships of the state and the water users.

⁴²See, for example, the Uttar Pradesh Water Policy, 1999, section 17(1)(d).

⁴³See, for example, the Maharashtra state Water Policy, 2003, section 4(2).

⁴⁴See for example the Madhya Pradesh state water policy, 2003 for integrated development of water resources interlinking river system plan shall be prepared, safeguarding the interest of the state, available at www.ielrc.org/content/e0307.pdf [accessed on 20 September 2013].

⁴⁵See, for example, the Karnataka state Water Policy, 2002, section 7.

It may be noted that the water policy 2002⁴⁶ had emphasized ecosystem needs, and stated that minimum flows will be maintained in rivers. However, in the absence of legally binding mechanisms or safeguards to protect the minimum flows over the last 11 years, the situation has, if anything worsened. Rivers have turned into sewers and aquifers depleted at a higher rate; wetlands and other water bodies have been encroached upon; river beds have been mined for sand, reducing the rate of water percolation into aquifers.⁴⁷

A new consortium of business and international finance is systematically trying to influence how the world's water will be allocated in future. The consortium seeks to promote policies that will treat water primarily as an economic good to be bought and sold, rather than a fundamental right. Because the consortium works directly with governments, or its office holders, its initiatives are proceeding without much public awareness or attention.⁴⁸

The latest example of this is India's Draft National Water Policy 2012 (NWP) circulated by the Ministry of Water Resources in January to water experts as part of its consultation procedures. It was available for public comments until 29 February 2012.⁴⁹

The National Water Resource Council has adopted the National Water Policy (2012). The consensus in this regard was made during 6th meeting of the council held in New Delhi under the chairmanship of Prime Minister Dr. Manmohan Singh.⁵⁰ Explaining the salient features of the draft Policy, Shri Harish Rawat, Minister of Water Resources, said that the draft National Water Policy (2012) was the result of wide consultations held with all the stakeholders including consultations with Members of Parliament, academia, NGOs, corporate sector and Panchayati Raj Institutions.

The National Water Resources Council meeting was attended by several Chief Ministers, Union Ministers and state Ministers. Chief Ministers of Assam, Punjab, Mizoram, Goa, Maharashtra, Haryana, Himachal Pradesh, Karnataka, Jharkhand and Governor of Punjab and Administrator of Union Territory of Chandigarh participated in the meeting. Several states were represented by their Ministers who also spoke during the Council meeting.

⁴⁶G.N. Kathpalia Rakesh Kapoor, "Water Policy and Action Plan for India 2020: An Alternative Future Development", *Research and Communications Group*, 2002, available at http://planningcommission.gov.in/reports/genrep/bkpat2020/10_bg2020.pdf, [accessed on 20 September 2013].

⁴⁷Shiney Varghese, "Corporatizing Water: India's Draft National Water Policy", 2012, available at <http://www.iatp.org/documents/corporatizing-water-india%E2%80%99s-draft-national-water-policy>, [accessed on 24 September 2013].

⁴⁸*Ibid.*

⁴⁹*Ibid.*

⁵⁰PM addresses 6th meeting of National Water Resources Council available at <http://www.indiablooms.com/NewsDetailsPage/2012/newsDetails281212o.php>, [accessed on 22 September 2013].

Despite opposition from the states to several contentious clauses in the draft National Water Policy, 2012, the National Water Resources Council meeting chaired by Prime Minister Manmohan Singh ‘adopted’ the policy ‘with modifications’ and decided to hold wider consultations with them in a ‘follow-up action’.⁵¹

Many states, including those ruled by the Congress, opposed the proposal to set up an overarching national legal framework for water governance.⁵²

Reading between the lines, Tamil Nadu Public Works Minister K.V. Ramalingam pointed out in his address: ‘Incentivising states to undertake water reforms may mean tying up central funding to so-called reforms measures like imposing water tariff on agriculture use or creating a water regulatory authority to fix tariff’.⁵³

The preamble of the National Water Policy, 2012 gives reasons for the revision of National Water Policy, 2002. It notes that ‘low consciousness about the scarcity of water and its life sustaining and economic value results in its mismanagement, wastage, and inefficient use, as also pollution and reduction of flows below minimum ecological needs. In addition, there are inequities in distribution and lack of a unified perspective in planning, management and use of water resources’.⁵⁴ ‘The objective of the National Water Policy is to take cognizance of the existing situation and to propose a framework for creation of an overarching system of laws and institutions and for a plan of action with a unified national perspective’, says the preamble of National Water Policy, 2012.⁵⁵ Further, it also advocates that such a framework law must recognize water not only as a scarce resource but also as a sustainer of life and ecology. Therefore, water, particularly, groundwater, needs to be managed as a community resource held, by the state, under public trust doctrine to achieve food security, livelihood and equitable and sustainable development for all. It also suggests that existing Acts may have to be modified accordingly.⁵⁶

It may be noted that preamble of National Water Policy accords primacy to groundwater. However, freshwater is equally important for life sustaining environment. We have neglected investment and maintenance of surface water distribution and storage.

⁵¹PM’s assurance on water policy cuts no ice with states, New Delhi, December 28, 2012, see also <http://www.thehindu.com/news/national/pms-assurance-on-water-policy-cuts-no-ice-withstates/article4248892.ece> [accessed on 28 September 2013].

⁵²Andhra Pradesh, Tamil Nadu, Kerala, Punjab, Haryana, Bihar, Uttar Pradesh, Madhya Pradesh, Gujarat, Jharkhand, Chhattisgarh, Karnataka and Tripura. They said this would impinge on their rights, water being a state subject. Chhattisgarh, Jharkhand, Uttar Pradesh and Bihar say such laws should be prepared by states and not the Centre; Karnataka wants the Inter-state Water Disputes Act revisited four non-congress ruled states—Chhattisgarh, Jharkhand, Uttar Pradesh and Bihar—opposed an overarching national legal framework on water management, saying any such law should be prepared by the states and not the Centre.

⁵³*Ibid.*

⁵⁴The National Water Policy, 2012; Preamble (1.1).

⁵⁵*Ibid.*

⁵⁶*Id.*, 2.2.

Coming to water users, policy says ‘a system to evolve benchmarks for water uses for different purposes, i.e., water footprints, and water auditing should be developed to promote and incentivize efficient use of water’.⁵⁷ Conceding water as an economic good, policy asks for equitable access to water for all and its fair pricing, for drinking and their uses such as sanitation, agricultural and industrial.⁵⁸

Recognizing the importance of water as a public good or a social good or as a human right, policy says ‘there should be a forum at the national level to deliberate upon issues relating to water and evolve consensus, co-operation and reconciliation amongst party states’. A similar mechanism should be established within each state to amicably resolve differences in competing demands for water amongst different users of water, as also between different parts of the state.⁵⁹

National Water Policy, 2012 also calls for strict regulation of urban settlements, encroachments and any developmental activities in the protected upstream areas of reservoirs/water bodies, key aquifer recharge areas that pose a potential threat of contamination, pollution, reduced recharge and those endanger wild and human life.⁶⁰ It also pleads that water resources projects and services should be managed with community participation.⁶¹ It is pertinent to note that policy also gives the impression that it favours public–private partnership mode. The quest for public–private partnership mode is reflected through the policy directives which says that ‘for improved service delivery on sustainable basis, the state Governments/urban local bodies may associate private sector in public private partnership mode with penalties for failure, under regulatory control on prices charged and service standards with full accountability to democratically elected local bodies’.⁶²

National Water Policy, 2012 recommends for National Water Board. It mentions that National Water Board should prepare a plan of action based on the National Water Policy, as approved by the National Water Resources Council, and to regularly monitor its implementation.⁶³

National Water Policy, 2012 looks forward and expects that ‘the state Water Policies may need to be drafted/revised in accordance with this policy keeping in mind the basic concerns and principles as also a unified national perspective’.⁶⁴

National water policy 2012 accords preemptive priority for safe and clean drinking water and sanitation for all, and prioritizes meeting water requirements for ecosystems.⁶⁵ The policy stresses water use efficiency improvements across sectors —in agriculture, industry and urban domestic sector, and improvements in rural

⁵⁷*Id.*, 6.1.

⁵⁸*Id.*, 7.1.

⁵⁹*Id.*, 12.1.

⁶⁰*Id.*, 8.3.

⁶¹*Id.*, 12.3.

⁶²*Ibid.*

⁶³*Id.*, 16.1.

⁶⁴*Id.*, 16.2.

⁶⁵*Id.*, 1.3 (ii, iii & iv).

water supply, waste water treatment and reuse of treated waste water. However, a closer look at the policy shows some serious missing pieces. First and foremost, water is not articulated strongly enough as a fundamental human right. This is despite India voting in favour of the United Nations General Assembly Resolution on the Right to Water in 2010. In fact, while the National water policy suggests that ‘water for such human needs should have a pre-emptive priority over all other uses’.⁶⁶ Without any safeguards and legally binding mechanisms for ensuring that water supply systems are accountable and effective, there is very little chance that this preemptive prioritization will result in ensuring access to water for all in India.⁶⁷

National Water Policy, 2012 does suggest various institutional mechanisms to strengthen the current treatment of water as an economic good.⁶⁸ This is in line with what John Briscoe, who was World Bank’s senior water advisor for over a decade, advocated for India.⁶⁹

While other parts of the world are bringing water services back into the public realm due to negative experiences with privatization,⁷⁰ India’s new policy is heading in the opposition direction by suggesting that the state should function simply as a regulator or facilitator, and that service delivery should be handed over to local communities or private sector,⁷¹ instead of exploring how to make 24/7 delivery possible by strengthening the capacity of the public sector. In this context, it is important to note that policy mandates that the Centre, the states and the local bodies (governance institutions) must ensure access to a minimum quantity of

⁶⁶*Id.*, 1.3 (vi).

⁶⁷*Id.*, 7.1, 7.3, 7.5.

⁶⁸*Id.*, 12.3, 12.5, 12.6 and 12.7.

⁶⁹In fact, he not only advocated for an economic valuation of water but also effectively advocated that the state renege on its responsibilities to its people to supply water. For example, in India’s Water Economy: Bracing for a Turbulent Future, 2005.

⁷⁰Private-sector water services have clearly failed in many countries, including those in the global North, and local governments have taken over again. In the current year, for-profit private water companies in England are raising tariffs, while the publicly owned service in Scotland is not. Just over a decade ago, water wars in Bolivia reversed privatization moves. Evidently, private partnership imposes the burden of extra costs.

⁷¹In a number of districts of India, Coca-Cola and its subsidiaries are accused of creating severe water shortages for the community by extracting large quantities of water for their factories, affecting both the quantity and quality of water. Coca-Cola has the largest soft drink bottling facilities in India. Water is the primary component of the products manufactured by the company. There have been numerous public protests of The Coca-Cola Company’s operations throughout India, involving thousands of Indian citizens and several nongovernmental organizations. Protests against the Coca-Cola factories have taken place in a number of districts including Mehdiganj near the holy city of Varanasi; Kala Dera, near Jaipur, Rajasthan; Thane district in Maharashtra; and Sivaganga in Tamil Nadu; The Right to Water under the Right to Life: India available at <http://www.righttowater.info/progress-so-far/timeline/legal-redress/the-right-to-water-under-the-right-to-life-india/> [accessed on 30 September 2013].

potable water for essential health and hygiene to all its citizens, available within easy reach of the household.⁷²

In many ways, India's National Water Policy, 2012 epitomizes not only what is being advocated in the area of water governance, but also the problems with the initiatives being pursued around the world. Multi-nationals are no longer content with profiteering from their traditional areas of businesses: They want to play a larger role in allocation of world's natural resources, which have so far been in the public realm. The actual water users and their representatives are marginalized.⁷³

According to Himanshu Thakkar, of the New Delhi-based South Asia Network on Dams, Rivers & People (SANDRP), who has been involved in the water sector for over two decades, 'limited participation of communities in the process threatens to make the exercise almost entirely undemocratic and is likely to be hijacked by vested interests'?⁷⁴

The National Water Policy, 2012 gives out contradictory signals by seeking to manage water as a community resource⁷⁵ and, at the same time, calling it an economic good.⁷⁶ The policy seeks to manage water as a community resource held by the state under public trust doctrine to achieve food security, livelihood, and equitable and sustainable development for all. Yet, somewhat contradicting that lofty ideal, it also calls water an economic good. The ministry wants to take away proprietary rights on water. This means no one will be able to draw groundwater without government permission even from private land.

'It is a patchwork quilt', says former water resources secretary Ramaswamy R. Iyer. 'Can we say that water is a life-right and also an economic good to be priced on full recovery basis?' he asked⁷⁷ 'Privatisation is not going to solve the problems of overcoming the inefficiencies in the system. Today, only 40% of the water meant

⁷²The National Water Policy, *Supra* note 54, 3.2.

⁷³Shiney Varghese, *Supra* note 47.

⁷⁴Not the Farmers, Not the Environment National Policy, 2012 largely seeks to help the vested interests available at http://sandrp.in/drپDRP_Jan_Feb_2012.pdf [accessed on 24 September 2013].

⁷⁵The National Water Policy, *Supra* note 54, 1.3 (iv), the protests by villagers from Plachimada, in the southern state of Kerala, have shown the strength of community-led activities, even against this global multi-national company. Through round-the-clock vigils outside the factory gates, they have managed to 'temporarily' shut down Coca-Cola's local bottling plant. As of early 2007, the factory had remained closed for a number of years and a combination of community action and legal redress was aimed at permanent closure; The Right to Water under the Right to Life: India available at <http://www.righttowater.info/progress-so-far/timeline/legal-redress/the-right-to-water-under-the-right-to-life-india/> [accessed on 30 September 2013].

⁷⁶*Id.*, 1.2 (xiii) and (7.1 to 7.5) Earlier, an international water summit in Bangalore that discussed private-sector participation in water delivery ended on a dry note when a show-closing Water Walkathon was abandoned after anti-privatization activists stormed the streets, available at <http://forbesindia.com/article/briefing/water-policy-draft-is-convoluted/32338/0>, [accessed on 16 September 2013].

⁷⁷K.P. Narayana Kumar, "Water Policy Draft is Convoluted", 28 February 2012, available at <http://forbesindia.com/article/briefing/water-policy-draft-is-convoluted/32338/0> [accessed on 26 September 2013].

for irrigation actually is put to use, the rest is lost to seepage or robbery', says K.J. Joy, senior fellow at Society for Participative Ecosystem Management.⁷⁸

It may be noted that the one area where proponents and opponents of the water policy converge are on the need to conserve groundwater. Lack of regulation and indiscriminate extraction has led to a lowering of the water table and water quality problems in many regions of Punjab, Rajasthan, Haryana, Gujarat, Tamil Nadu and Uttar Pradesh. These six states account for half the food grain production in the country.

The policy does hint at that, but with shaky conviction. The 'service provider' role of the state has to be gradually reduced and shifted to regulation and control of services. The water-related services should be transferred to community and/or private sector with appropriate 'public private partnership' (PPP) model under the general superintendence of the state or the stakeholders, it says.⁷⁹ 'That' former secretary Iyer says 'is the thin end of the wedge towards privatisation. On the one hand, if basic water is a fundamental right, the state cannot abdicate its responsibility to ensure that it is not negated.⁸⁰ On the other, water has to be managed at the local level with community participation, PPP is a dubious proposition'.⁸¹

It has been suggested that rules governing the use of water, an essential part of life itself, must be the result of careful consultation with all stakeholders, especially the least powerful, and should not be driven by corporations and international finance. This is important not only in India but also for the future of water governance globally.⁸²

A recent report, National Water Resources Framework Study: Roadmaps for Reforms, offers some clues.⁸³ There are striking convergences between sections of this report and parts of the National Water Policy, 2012. This report by the Council

⁷⁸Ibid.

⁷⁹The National Water Policy 2012, *supra* note 54, 12.3.

⁸⁰The People's Campaign for the Right to Water has organized an *e-petition* opposing 'the very concept of water as an economic good' and India's draft national water policy. Andrew Ranallo, 'Drawing a Line in the Water: India's New Draft National Water Policy', Institute of Agricultural and Trade Policy, available at [http://www.iatp.org/blog/201202/drawing-a-line-in-the-water-india %E2%80%99s-new-draft-national-water-policy](http://www.iatp.org/blog/201202/drawing-a-line-in-the-water-india-%E2%80%99s-new-draft-national-water-policy), [accessed on 28 February 2012].

⁸¹Ibid.

⁸²See generally, the National Water Resources Framework Study: Roadmaps for Reforms, available at <http://ceew.in/pdf/CEEW-WRG10Oct11.pdf>. [accessed on 6, February 2012]; Charting our water futures: Economic Frameworks to inform decision-making, available at http://www.2030waterresourcesgroup.com/water_full/Charting_Our_Water_Future_Final.pdf. [accessed on 6 February 2012]; Water Resources Group: A new model for water sector transformation, available at <http://forumblog.org/2012/01/water-resources-group-a-new-model-for-water-sector-transformation/>, [accessed 9 February 2012]; Africa: Water Partnership for South Africa Launched at the World Economic Forum on the Continent, available at <http://allafrica.com/stories/201105050349.html>, [accessed on 8 February 2012]; Home page of Water, at World Economic Forum, available at <http://allafrica.com/stories/201105050349.html>, [accessed on 8 February 2012].

⁸³National Water Resources Framework Study: Roadmaps for Reforms, available at <http://ceew.in/pdf/CEEW-WRG10Oct11.pdf>. [accessed on 6 February 2012].

on Energy, Environment and Water (CEEW)⁸⁴ was commissioned at the request of the Planning Commission of India to the 2030 Water Resources Group (WRG), towards the development of the India's 12th Five-Year plan (2012–2017).⁸⁵

One may conclude the discussion related to water policy in the words of Prof. Upendra Baxi that the so-called Indian National Water Policy, regimes thrive fully on the practices ordaining human sightlessness as a governance virtue. These create an illusory appearance of change masking the deep HRTW Indian backwardness. The situation has not been further ameliorated by the new 'wisdom' that speaks to us in terms of privatization, public-private partnerships and some newly instituted regulatory cultures.⁸⁶

While formulating the Twelfth Plan, a subgroup (as part of the Working Group on Water Governance) was set up under the former Secretary, Water Resources, Ramaswamy R. Iyer to draft a National Water Framework Law. The subgroup evolved a draft National Water Framework Law, which was deliberated during the third meeting of the Steering Committee on Water Resources and Sanitation for Twelfth Five-Year Plan held on 20 October 2011. Secretary, Ministry of Water Resources, while appreciating the effort, stated that the Draft Act should be in conformity with the existing Acts, Laws, Principles, etc. and some minimum standards should be prescribed for the states for implementation and to prevent them from 'Business As Usual' (BAU) scenario. Earlier attempts on prescriptive laws by Centre have not helped and states themselves have acknowledged that they require a strong push from the Centre to make their establishment recognize the critical stage of water development.⁸⁷

Ministry of Water Resources was also of the opinion that the National Water Framework Law needed to be evolved through wider consultations with all stakeholders, particularly the state governments. In view of this, Ministry of Water Resources initiated action for preparation of Water Framework Act. A Drafting

⁸⁴CEEW is one of the Indian partners of the WRG, a high profile public-private partnership housed in the International Finance Corporation (of the World Bank Group). Financed by multilateral banks and bilateral aid organizations such as the U.S. Agency for International Development, the Inter-American Development Bank, the International Finance Corporation and Asian Development Bank amongst others; the WRG is an offspring of the World Economic Forum (WEF) Water Initiative. Formed in 2008, the WRG's main members are McKinsey & Company and the World Bank Group (led by the International Finance Corporation) as well as a consortium of business partners, most of them in the food/beverages/agri-business sector and already part of the WEF Water Initiative.

⁸⁵*Ibid.*

⁸⁶Upendra Baxi, *Supra* note 1, at 5.

⁸⁷Report of the Committee for Drafting of National Water Framework Law May 2013, New Delhi, at 2, available at <http://mowr.gov.in/writereaddata/linkimages/nwfl1268291020.pdf> [accessed on 8 February 2012].

Committee headed by Dr. Y.K. Alagh,⁸⁸ was constituted⁸⁹ for Drafting National Water Framework Law on 3 July 2012.

The committee report states ‘It is this recognition of the need for a minimal national consensus on certain basic perceptions, concepts and principles that led to the adoption of the National Water Policy (NWP) of 1987, 2002 and 2012. However, a national water policy has no legal status. A national water law is, therefore, necessary to make the tenets of such a consensual statement justiciable’.⁹⁰

The importance and the far-reaching scope envisaged for the Framework Law is seen from the Terms of Reference given to the Alagh Committee by MoWR. The TOR states⁹¹

Even while it is recognized that states have the right to frame suitable policies, laws and regulations on water, there is a felt need to evolve a broad over-arching national legal framework of general principles on water to lead the way for essential legislation on water governance in every state of the Union and devolution of necessary authority to the lower tiers of government to deal with the local water situation. Such a framework law must recognize water not only as a scarce resource but also as a sustainer of life and ecology. Therefore, water needs to be managed as a community resource held, by the state, under public trust doctrine to achieve food security, livelihood, and equitable and sustainable development for all.⁹²

The Alagh draft starts the section on the Basic Principles with the clause ‘The planning and management of water resources shall be integrated appropriately with the management of all resources and shall take into account in an integral manner the local, regional, state and national needs’. Thus, the focus is on human needs. The clauses following these do articulate the principles of ecology, equity,

⁸⁸Chancellor, Central University of Gujarat; Vice-Chairman, Sardar Patel Institute of Economics & Social Research; Former Minister of Power, Planning Science and Technology, Government of India.

⁸⁹The other Members of the Drafting Committee were Professor N.R. Madhava Menon, International Bar Association – Continuing legal Education Centre (IBA-CLE) Chair in National Law School of India University (NLSIU), Bangalore; Professor K.P. Singh, Professor, Punjab University; Ms. Jyoti Sharma, Forum for Organized Resource Conservation and Enhancement (FORCE); Shri Videh Upadhyay, Advocate; and Officers from Ministry of Water Resources, Central Water Commission, Central Ground Water Board. The Committee for drafting National Water Framework Law held four meetings on 25 September 2012, 12 October 2012, 22 March 2013 and on 22 April 2013. A subgroup headed by Special Secretary, Ministry of Water Resources was also set up on 31 December 2012 to prepare working draft of the National Water Framework Law. A colloquium was also held on 25 February 2013 at Administrative Staff College of India, Hyderabad. Dr. Y.K. Alagh has submitted its report to the Ministry of Water Resources on 28 May 2013.

⁹⁰Shripad Dharmadhikary, “National Water Law Needed, But Not This”, available at <http://www.indiatogether.org/2013/jun/law-waterlaw.htm> [accessed on 10 February 2012].

⁹¹*Infra* note 94.

⁹²Government of India Ministry of Water Resources, Report of the committee for Drafting of National Water Framework Law, May, 2013, New Delhi, available at <http://mowr.gov.in/writereaddata/linkimagesnwfl1268291020.pdf> [accessed on 18 February 2012].

ecological flows, etc. but the formulations are much weaker. An example is the issue of basic right to water.⁹³ The Alagh draft sees the right to water as being limited to only potable water. The Iyer Committee,⁹⁴ on the other hand, defines the scope of the right as ‘water for life’, and provides that this right includes right of access to ‘water sources including rivers, streams, lakes, springs, and others’ for tribal and other communities dependent on them.⁹⁵

⁹³Dozens of countries explicitly recognize the right to water in national legislation or policy, including Algeria, Angola, Argentina, Bangladesh, Belarus, Belgium, Brazil, Burkina Faso, Cameroon, Central African Republic, Colombia, Costa Rica, Dominican Republic, Finland, France, Germany, Ghana, Guatemala, Guinea, Honduras, Indonesia, Latvia, Luxembourg, Madagascar, Mauritania, Namibia, the Netherlands, Nicaragua, Norway, Paraguay, Peru, Portugal, Romania, Russia, Senegal, South Africa, Spain, Sri Lanka, Tanzania, Ukraine and Venezuela. France enacted a new law in 2006 that explicitly recognizes the right to water. See also H. Smets. 2006. *The Right to Water in National Legislation*. Paris: Agence Française de Development, pp. 47–49; M. Langford, A. Khalfan, C. Fairstein and H. Jones, 2004. *Legal Resources for the Right to Water: International and National Standards*, Centre on Housing Rights and Evictions, Geneva.

⁹⁴Why is a national law on water necessary? There are several reasons: (1) Under the Indian Constitution water is primarily a state subject, but it is an increasingly important national concern in the context of (a) the judicial recognition of the right to water as a part of the fundamental right to life; (b) the general perception of an imminent water crisis, and the dire and urgent need to conserve this scarce and precious resource; (c) the severe and intractable inter-use and inter-state conflicts; (d) the pollution of rivers and other water sources, turning rivers into sewers or poison and contaminating aquifers; (e) the long-term environmental, ecological and social implications of projects to augment the availability of water for human use; (f) the equity implications of the distribution, use and control of water; (g) the international dimensions of some of India’s rivers; and (h) the emerging concerns about the impact of climate change on water and the need for appropriate responses at local, national, regional and global levels. It is clear that the above considerations cast several responsibilities on the central government, apart from those of the state governments. Given these and other concerns, the need for an overarching national water law is self-evident; (2) Several states are enacting laws on water and related issues. These can be quite divergent in their perceptions of and approaches to water. Some divergences from state to state may be inevitable and acceptable, but extreme and fundamental divergences will create a very muddled situation. A broad national consensus on certain basics seems very desirable. (3) Different state governments tend to adopt different legal positions on their rights over the waters of a river basin that straddles more than one state. Such legal divergences tend to render the resolution of inter-state river–water conflicts extremely difficult. A national statement of the general legal position and principles that should govern such cases seems desirable; (4) Water is one of the most basic requirements for life. If national laws are considered necessary on subjects such as the environment, forests, wildlife, biological diversity, etc., a national law on water is even more necessary. Water is as basic as (if not more basic than) those subjects; (5) Finally, the idea of a national water law is not something unusual or unprecedented. Many countries in the world have national water laws or codes, and some of them (for instance, the South African National Water Act of 1998) are widely regarded as very enlightened. The considerations behind those national codes or laws are relevant to India as well, although the form of a water law for India will clearly have to be guided by the nature of the Indian Constitution and the specific needs and circumstances of this country, available at <http://www.thehindu.com/opinion/lead/why-a-national-water-framework-law/article4280263.ece> [accessed on 18 September 2013].

⁹⁵*Ibid.*

4 Draft National Water Framework Bill, 2013⁹⁶

The preamble of the Draft National Water Framework, 2013 states that ‘there is a need to evolve a National Framework Law as an umbrella statement of general principles governing the exercise of legislative and/or executive (or devolved) powers by the Centre, the states and the local governing bodies’. Further, it adds that ‘this should lead the way for essential legislation on water governance in every state of the Union and devolution of necessary authority to the lower tiers of government to deal with the local water situation’.⁹⁷

Draft framework Bill, 2013 clearly indicates that the legislative power of the present Act may come under Article 252 of the Constitution of India.⁹⁸ It shall apply to such other states which adopt this Act by resolution passed in that behalf under clause (1) of Article 252 of the Constitution. The United Nations has recognized the Right to Water as a basic human right. Although the Right to Water is not enshrined in India’s Constitution as Fundamental Right, various judgments of the High Courts and Supreme Court have equated the right to water as part of the ‘Right to Life’, which is a fundamental right.⁹⁹ Draft National Frame work stipulates that every individual has a right to a minimum quantity of potable water for

⁹⁶The Draft National Water Framework Bill, 2013 comprises eight chapters. It includes Preliminary (including definitions); Basic Principles of Water Management; Right to Water, Preservation of Quality and Water Pricing; Water Resources Projects: Planning and Management; Promotion of Innovation and Technology; Convergence of Schemes; Coordination and Policy Support Mechanism; Miscellaneous; Chapter - I deals with short title, extent, commencement and definitions. Chapter - II deals with basic principles for water management. These principles are considered fundamental to a system of water governance which ensures prudent, wise, equitable, socially just, conflict free, efficient and sustainable management of water. In Chapter III, considering the problems of water quality prevalent in the country, it was felt necessary to specify the minimum standards of water supply of various uses. Chapter IV of the draft Bill calls for preparation of comprehensive master plans for inter-state and intra-state river basins/ Sub-basins. The Chapter V of the Draft Bill recognizes the need to development and promotion of indigenous knowledge and technologies of conservation of water. Integration of all schemes relating to water and convergence of schemes has been emphasized in Chapter VI. Chapter VII provides for setting up of a high-powered committee for coordination and policy support mechanism for various agencies at the Centre and in states that deal with water. Chapter VIII deals with miscellaneous issues such as enforcement of the Act, framing and laying of the rules, etc.

⁹⁷The National Water Policy, *Supra* note 54, 2.1.

⁹⁸See generally, V.S. Mishra, “National Water Policy and Need for a National Legislation on Water: Indian Scenario”, XXXIX(3), *Indian Bar Review*, 2012, pp. 97–118.

⁹⁹R.L.E.K. v. state of U.P. AIR 1985-SC 652, 656; M.C. Mehta v. Union of India AIR 1988 SC 1037, 1040; Chhetriya Pradushan Mukti Morcha Sangarsh Samiti v. state of U.P. AIR 1990 SC 2060, 2062; The Supreme Court extended the benefit of Art. 21 to citizens only; Subhas Kumar v. state of Bihar (1991) 1 SCC 598, 604; Virendra Gaur v. state of Haryana (1995) 2 SCC 577; Indian Council for Enviro Legal Action v. Union of India AIR 1996 SC 1446; D.K. Joshi v. state of U.P. 1999 (7) SCALE 181, See also, Dr. Ajay Singh Rawat v. Union of India (1995) 3 SCC 266, 267; *Id.*, at 182. See also, Ramjee Patel & Others v. Nagrik Upbhokta Marg Darshak Mandal 2000 (1) SCALE 682; A.P. Pollution Control Board v.M.V. Nayudu (2001) 2 SCC 62; Hamid Khan v. state of M.P. AIR 1997; F.K. Hussain v. Union of India AIR 1990 Ker 321; S.K. Garg v.

essential health and hygiene and within easy reach of the household. The minimum quantity of potable water shall be prescribed by the appropriate Government after expert examination and public consultation. However, the minimum quantity of potable water shall not be less than 25 litres per capita per day. The state's responsibility for ensuring people's right to water¹⁰⁰ shall remain despite corporatization or privatization of water services and the privatization of the service, where considered necessary and appropriate, shall be subject to this provision, says the draft Bill which also mandates that the appropriate government shall specify the quality standards of water supply specified for different uses, such as drinking, other domestic uses, livestock, irrigation, industries, etc., and shall ensure that these standards are fully complied with.¹⁰¹

The Draft Bill also provides that water quality¹⁰² in all rivers, streams, surface water bodies, aquifers and other water sources throughout the country, shall be protected and improved to conform to such standards as may be prescribed.¹⁰³

The Draft Bill seeks to provide right to water¹⁰⁴ while stating that water allocation and pricing shall be based on economic principles to ensure its development costs, efficient use and reward conservation. The Draft further elaborates that the principle of differential pricing of water may be retained for the preemptive uses of water for drinking and sanitation; and high priority allocation for ensuring food security and supporting livelihood for the poor. The Draft Bill calls for equitable access to water for all and makes it clear that its pricing, for drinking and other uses such as sanitation, agricultural and industrial, shall be arrived at after wide ranging consultation with all stakeholders through independent statutory Water Regulatory

(Footnote 99 continued)

state of U.P. and other AIR 1999 All 87; See also, Attakoya Thangal v. Union of India 1990 KLT 580 (right to sweet water).

¹⁰⁰The Draft National Water Framework Bill, 2013, *supra* note 96, section 4 (1, 2 and 3); See also Vinod Shankar Mishra, "The Supreme Court and Right to Clean Water", XXXI (3&4), *Indian Bar Review*, 399–406, 2004.

¹⁰¹*Id.*, Section 4(i); Report of Committee, Chapter II, *Basic Principles for Water Management*, at 34 available at <http://mowr.gov.in/writereaddata/linkimages/nwfl1268291020.pdf>, See section 4 (2), (3) and (4).

¹⁰²Subject to the provisions of the Environment (Protection) Act, 1986; the Water (Control and Prevention of Pollution) Act, 1974, the approach to the prevention and control of pollution and contamination of water sources shall include (i) minimizing the generation of waste in all water uses; (ii) reducing non-point source of pollution; (iii) recovering, to the extent possible, water for some uses from waste; and (iv) ensuring that nothing that does not meet certain stringent quality standards, as may be prescribed, is allowed to enter water sources.

¹⁰³The Draft National Water Framework Bill, 2013, *supra* note 96, section 5 (1) and (2), See also, section 4 (2) (3) and (4).

¹⁰⁴V.S. Mishra, *Supra* note 100.

Authority, set up by each state.¹⁰⁵ Decisions of the Water Regulatory Authority will be subject to judicial review.

The Bill also lays down that ‘the appropriate Governments shall take all steps to ensure the availability of effective judicial remedies for persons whose legal rights have been violated including legal rights arising out of this Act, and who suffer or are under a serious threat of suffering damage arising from programs, plans, projects, or activities relating to water management. For this purpose, it says that remedies under this Section shall, as appropriate, provide for preventive remedies to prevent damage arising from programs, plans, projects, or activities relating to water management; compensation for damage; criminal prosecution of offenders and any other appropriate remedy in accordance with the provisions of any other law for the time being in force’.¹⁰⁶

The Draft Bill requires that appropriate government shall recognize, undertake and encourage a participatory approach to water management at all levels through appropriate laws, regulations and administrative measures including establishment of Water Users Associations.¹⁰⁷ The Draft Bill holds that states shall, where appropriate, enact laws and regulations to accomplish the purposes set forth in this Act and shall adopt adequate and efficient administrative measures, including Management and implementation Plans for the enforcement of this Act. The Draft Bill argues that the existing legislations both at the Central as well as state level shall be reviewed and amended, wherever appropriate, so as to conform to the principles and provisions of this Act.

While recognizing the government as trustee of water resources, the Draft Bill gives the flexibility of roping private agency for some of the functions of the state. In this context, it stipulates that allocation and pricing should be based on economic principles to ensure its development cost and so that water is not wasted in unnecessary uses and could be utilized more gainfully and water infrastructure projects are made financially viable.¹⁰⁸

It may be noted that the provisions of this national framework law or the Plans made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of such law. The central government may by a notification make rules to carry out the provisions of this Act. The state government may by a notification, and consistent with this Act and the rules made by the central government make rules to carry out the provisions of this Act.¹⁰⁹

¹⁰⁵The Draft National Water Framework Bill, 2013, *Supra* note 96, section 18.

¹⁰⁶*Id.*, section 19, See also section 19 (2) and (3).

¹⁰⁷*Id.*, section 15(1), See also sections 15(2), 15(3) and 15(4).

¹⁰⁸*Id.*, section 6 (1), See also sections 6(2), 6(3) and 6(4).

¹⁰⁹*Id.*, section 20, 21 and 22.

5 Conclusion

Law and policy are intimately related to each other. The Supreme Court of India has played a significant role to protect our natural resources including water resources. It has evolved Public Trust Doctrine,¹¹⁰ Precautionary Principle and Doctrine of Sustainable Development to enhance, protect and preserve our water resources. It is relevant to note that above-mentioned environmental law principles/doctrines have been incorporated in National Water Policy, 2012 and Draft National Water Framework Bill, 2013. It is high time to utilize these principles in decision-making process to protect and preserve our natural resources/water resources. The source of legislative power of Draft National Water Framework Law is Article 252 of the constitution of India which ensures consultation and cooperation between Union of India and states Constituting the Union.

In the light of principles of distributive justice and equity, water should be made available to all sections of the society on the basis of need and not on the basis of financial considerations. It has been rightly pointed out by the Supreme Court of India¹¹¹ that the state is the legal owner of the natural resources as a trustee of people and although it is empowered to distribute the same, the process of distribution must be guided by the constitutional principles including doctrine of equality and larger public good. All efforts should be made by central government to implement the National Water Policy, 2012 in letter and spirit. National Water Policy 2012 provides solid framework for law reform at federal and state level. The Draft National Water Frame Work Bill, 2013 is a step in the right direction.

It must be remembered that law and policy are tools for providing social and economic justice to weaker and marginalized section of the society. It is high time to explicitly provide for Human Right to water in Part III of the Constitution of India and enact a national law to regulate, distribute and control water as a public good or a social good.

¹¹⁰The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today, every person exercising his or her right to use the air, water or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources"; *Center for Public Interest Litigation and others v. Union of India and others* <http://supremecourtofindia.nic.in/outtoday/39041.pdf> [accessed on 8 February 2012].

¹¹¹*Center for Public Interest Litigation and others v. Union of India and others* <http://supremecourtofindia.nic.in/outtoday/39041.pdf> [accessed on 8 February 2012].

Chapter 12

From Rio to Doha: In Search of Cooperative Action for Climate Change

Sukanta K. Nanda

1 Introduction

In December, 2012 came a surprising report that it is very likely that the Arctic Ocean may become ice free in the summer months, if the global temperature continues to rise by more than 2 °C over the current level. The report further says that there is more than 90 % possibility that the Arctic ice cover will continue to shrink through the twenty-first century with rising greenhouse gas emissions.¹ Really, it is shocking news for the entire humanity, because the fall out of such a climate change would be devastating. There is no denying the fact that the whole world is on the terrifying crossroads of the global environmental threat. Last few years dominated almost all the academic discourses about the serious threat climate change posed to the world. It is true and now we all agree that the emissions of greenhouse gases are responsible for such deteriorating climatic conditions. The entire system that is responsible to make life on earth possible is affected. We the people of the world are responsible for such deteriorating condition. This has now been reaffirmed that the human-induced climate change is heating up the atmosphere leading to dramatic changes in global ecosystem. Of course, there is a natural hand behind all such activities, but at the same time the contribution of the world community is significant and noteworthy. Thus the crucial question before the mankind is how to address the problem and find the solution. The study requires a multidisciplinary approach because the science of climate change is a complex issue and the impact is loud and clear.

In the recent past, many deliberations have taken place throughout the world about the threat posed to the Mother Earth mainly caused by the increasing

¹Draft copy of the UN's Intergovernmental Panel on Climate Change Report, as reported in *The Times of India*, BBSR, 15 December 2012.

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temperature of the atmosphere. This rise in temperature affects the climate to a great extent which leaves its impact felt globally. There is total consensus among the world leaders that fossil fuel emissions have been leading to a critical rise in atmospheric greenhouse gases, which in turn is causing global temperatures to rise thereby causing changes in the climate patterns of the earth. The greenhouse gases which contribute significantly to the warming of the globe also are responsible in interfering in the global climate.

The temperature of the earth is determined by the amount of incoming solar radiation that reaches and heats the surface. The greenhouse gases in the atmosphere allow the sun's ultraviolet radiation to penetrate and warm the earth, and they absorb the infrared energy that radiates back into the atmosphere. By blocking the escape of this radiation, these gases effectively form a blanket around the earth. Greenhouse gases make up only about 1 % of the atmosphere, but act like a blanket around the earth, thereby trapping the heat and keeping the planet warmer than it would be otherwise.

It is also a fact that the climate change affects the economic condition of urban poor to a great extent making their life miserable. If this trend continues, they will be the worst victims in the next few years. It is also feared that unless it is checked, it will affect the poor countries worst by imposing on them the disasters like severe drought, acute shortage of food, drinking water, etc. One of the leading experts in this field is of the opinion that 'understanding climate is like understanding the world economy; it is never solved by one new piece of information. And the answers are never in plain yes or no, but in degrees of certainty'.² In fact, a developing country like India having a population more than 100 crores needs to reorient its economic decisions more carefully and see that its climate policy is directed towards achieving the goal of saving this beautiful planet earth.

2 Addressing the Issue of Climate Change

It all started at Rio during the first ever Earth Summit on environment and development held in the year 1992. Along with the Rio Declaration, the Conference also adopted the Framework Convention on Climate Change. Concerned with the fact that the human activities have been substantially increasing the atmospheric concentrations of greenhouse gases that these increases enhance the natural greenhouse effect and that this will result in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind, the United Nations adopted a Framework Convention on Climate Change which was opened for signature at the Rio Summit in 1992 where 155 governments signed the convention and since then over 160 governments have ratified or otherwise committed themselves to this convention. Their purpose was to stabilize greenhouse gas

²Stephen Schneider, *The Times of India*, 15 December 2009.

concentrations in the atmosphere at a level that would prevent ‘dangerous’ human interference with the climate system. This was reflected in the objective of the Convention which says that ‘the ultimate objective of this Convention is to achieve in accordance with the relevant provisions of the convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’.³ Such a level is to be achieved within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner. The convention defines ‘climate change’ to mean ‘a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods’⁴ and the ‘climate system’ has been defined to mean ‘the totality of the atmosphere, hydrosphere, biosphere and geo-sphere and their interactions’.⁵

In order to achieve the objective of the Convention and to implement its provisions, the Convention requires that the parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country parties should take the lead in combating climate change and the adverse effects thereof.⁶ For the purpose, the convention also requires that taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, all parties shall ‘develop, periodically update, publish and make available to the Conference of the Parties national inventories of emissions from sources and removals by sinks of all greenhouse gases using comparable methodologies to be agreed upon by the conference of the parties’.⁷ In carrying out the commitment, the convention also speaks of conducting research and systematic observation and also to carry out education, training and public awareness programmes on climate change and its effects. The convention has established a ‘Conference of the Parties’ which is the supreme body of the Convention, which shall keep under regular review the implementation of the convention and any related legal instruments that the conference of parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.⁸

³The United Nations Framework Convention on Climate Change, 1992, Article 2.

⁴*Id.*, Article 1.

⁵*Ibid.*

⁶*Supra* note 3.

⁷*Id.*, Article 4.

⁸*Id.*, Articles 7(1) and 7(2).

3 Challenges We Face

Various studies, reports and assessments made so far on the possible impact of climate change present a very grim picture and the global climate change has become one of the most serious environmental concerns of our time. The consciousness is growing world over for understanding the possible fall out. Studies reveal that trends in the physical and biological environment and their relationship to regional climate changes has increased greatly and the recent regional changes in temperature have had discernible impacts on physical and biological systems.⁹

National Academy of Sciences (NAS) of the United States in a recent report¹⁰ has also confirmed that the world temperature is rising and it is expected that the trend will continue. And now it is sure that there will be a change in the seasons we experience. In fact, we have started experiencing the seasonal change particularly a little warmer climate than before which is also going to make our lives a little different. The NAS report is not sure about how much the human activity contributes to this warming but it is sure that the greenhouse emissions are rising and we, the human being, are very much responsible for causing this greenhouse problem.

It is a fact that total stock of greenhouse gases in the atmosphere is the cause of the global warming and if the emissions continue beyond the absorption capacity of the earth, the temperature is bound to rise. Although the developed economies are mainly responsible for this, its impact will be much greater in the developing countries and the impact on India will probably be greater. We may face the retreat of the glaciers, rising sea levels, new difficulties for the farming sector and above all the less predictable monsoon—on which the lives of so many Indians depend. If the global warming will continue, it will certainly have its impact felt on the social and economic characteristics of the society. Some potential areas likely to be affected are agriculture, water resources, coastal resources, energy and health of the people.

'Intergovernmental Panel on Climate Change'¹¹ (IPCC), the leading body for the assessment of climate change to provide the world with a clear, balanced view of the present state of understanding of climate change in its Fourth Assessment Report (AR4) has projected a serious picture of the earth's future. The report states that the global warming may have a devastating impact on the climate of the earth. It is very likely that climate change can slow down the pace of progress towards sustainable development either directly through increased exposure to adverse impact or indirectly through erosion of the capacity to adopt. The IPCC has made it

⁹Among the various reports the Reports of IPCC, UNEP, FAO and Global Biodiversity Outlook 3 are important.

¹⁰Stuart Lieberman, 'Environmental Justice: An Appraisal', *I ICFAI Journal of Environmental Law*, November 2002, at 76.

¹¹IPCC was established in 1988 by the World Meteorological Organization (WMO) and United Nations Environment Programme (UNEP) to investigate the problem that is threatening the world.

clear that the fact of global warming is unequivocal and there is enough evidence to indicate that this is due to anthropogenic reasons.

The United Nations Environment Programme, a few years back reported¹² that said that ‘cities from Beijing to New Delhi are getting darker; glaciers in ranges like the Himalayas are melting faster and weather systems becoming more extreme, in part, due to the combined effects of human-made Atmospheric Brown Clouds (ABCs) and greenhouse gases in the atmosphere’.¹³ The report further says that the clouds, the result of burning of fossil fuels and biomass, are in some cases and regions aggravating the impacts of greenhouse gas-induced climate change. This is because the ABCs lead to the formation of particles like black carbon and soot that absorb sunlight and heat the air and gases such as ozone which enhances the greenhouse effect of carbon dioxide.¹⁴ The regional haze, known as the Atmospheric Brown clouds, contributes to glacier melting, reduces sunlight and helps create extreme weather conditions that impact agricultural production thereby threatening the health and food supplies all over the world, more particularly in Asia. Thick-brown clouds of soot, particles and chemicals stretching from the Persian Gulf to Asia pose challenges to the agriculture and monsoon in the Asian region.

Besides all these, there are several other studies which suggest that the climate change is all set to compound the pressures on the natural resources and the environment associated with rapid urbanization, industrialization and economic development. Further, climate change is closely associated with loss of biodiversity and it has been reported that observed changes in climate have already adversely affected biodiversity at the species and ecosystem level, with further changes in biodiversity being inevitable with further changes in climate.¹⁵ Further, the Third Edition of the Global Biodiversity Outlook, a state-of-the-art summary of the status of biodiversity, reveals that the five main global drivers of biodiversity loss-habitat loss—the unsustainable use and over exploitation of resources, climate change, invasive alien species and pollution—have not only remained more or less constant over the last decade, but are in some cases intensifying.¹⁶

¹²The report came in 13 November 2008.

¹³Available at www.unep.org.

¹⁴Ibid.

¹⁵Secretariat of the Convention on Biological Diversity, Connecting Biodiversity and Climate Change Mitigation and Adaptation, Report of the Second Ad Hoc Technical Expert Group on Biodiversity and Climate Change, 2009.

¹⁶Secretariat of the Convention on Biological Diversity, Global Biodiversity Outlook, 2010.

4 Rio to Doha—The Journey So Far

As discussed above, the Rio Conference started the pace and the movement for concerted action on climate change with the adoption of the United Nations Framework Convention on Climate Change (UNFCCC). Climate change is one of the most important global environmental problems. Recognizing this and the threats posed by climate change, most countries joined this international treaty to find out the ways and means for reducing global warming and to deal with the increase in temperature. The Conference of the Parties (CoP) established under the Convention meets once in a year to specify rules for implementing the provisions of the convention. So far, the Conference of the Parties has held eighteen meetings, and the latest meeting was held at Doha, Qatar, from 26 November to 8 December 2012.

After 5 years of the adoption of the Framework Convention on Climate Change, the third conference of parties was held in Kyoto, Japan in December 1997 where in the progress made during the last 5 years was reviewed and future plans were chalked out by fixing strategies and objectives for the future. The outcome known as the ‘Kyoto Protocol’¹⁷ succeeded in taking certain decisions. The Kyoto Protocol is an international agreement linked to the United NFCCC. The major feature of the Kyoto Protocol is that it sets binding targets for 37 industrialized countries and the European community for reducing greenhouse gas (GHG) emissions. The major distinction between the Protocol and the Convention is that while the Convention encouraged industrialized countries to stabilize GHG emissions, the Protocol commits them to do so. Recognizing that developed countries are principally responsible for the current high levels of greenhouse gas emissions in the atmosphere as a result of more than 150 years of industrial activity, the Protocol places a heavier burden on developed nations under the principle of ‘common but differentiated responsibilities’. The Kyoto Protocol foresaw greenhouse gas mitigation through clean development mechanisms, Joint Implementation of Project and Emission Trading. The Protocol’s first commitment period began in 2008 to ensure that there is no gap between the end of the Kyoto Protocol’s first commitment period in 2012 and the entry into force of a future regime.

Another outcome was the ‘Delhi Declaration’, the eighth Conference of the Parties to the Convention which was held in New Delhi and was attended by more than 170 countries. In this 10 days conference which started on 28 October 2002, the main bone of contention was whether the developing countries should take on commitment for reduction of greenhouse gas emissions beyond 2012 when the commitment period under the Kyoto Protocol comes to an end.

The European Union and the other developed countries continued to insist that it was necessary for the developing countries to commit themselves to reduce the emissions because every country should do something to tackle the climate change problem. But the developing countries led by India maintained that it was not

¹⁷The Kyoto Protocol was adopted in Kyoto, Japan on 11 December 1997 and entered in to force on 16 February 2005. 184 Parties of the Convention have ratified this Protocol.

possible as their contribution to the problem was far less than that of the developed world, i.e. a tiny fraction of what the developed countries produce. The developing countries maintained that they do not have adequate resources to meet their basic needs. The Indian Prime Minister maintained that ‘the developing countries struggling to feed their population only produced a tiny fraction of greenhouse gases and could not afford the cost of extra emissions cuts’ and also ‘Climate change mitigation will bring additional strain to the already fragile economies of the developing countries and will affect our efforts to achieve higher growth rates to eradicate poverty’.¹⁸

For the first time, the declaration linked climate change to sustainable development and talked more of adaptability of vulnerable communities to climate change rather than ways of reducing carbon emissions. But this was not acceptable to some. While the European Union and the other countries, which had committed to provide finances for the funds, insisted that activities that go to reduce or avoid emission of greenhouse gases should also be included, the developing countries emphasized that the funds should be used more for improving their capacity to take care of the adverse impacts of the climate change.

However, despite all the differences, the general view that emerged at the end of the ministerial plenary session was that climate change significantly impacts economic development and hence, the concern should be addressed in the context of promoting sustainable development. Many developing countries observed that adaptation to adverse effects of climate change had to be accorded priority and necessary actions taken to increase their institutional and financial capabilities to cope up with the ill effects of climate change.

The thirteenth Conference of the Parties to the United Nations Framework Convention on Climate change and the third meeting of the parties to the Kyoto Protocol was held in Bali, Indonesia from 3–15 December, 2007. More than 10,000 participants, including representatives of over 180 countries, together with observers from intergovernmental and non-governmental organizations and the media attended this conference. The conference attracted a great deal of attention world over mainly because of two reasons. In the first place just before the conference, the fourth Assessment Report of the Intergovernmental Panel on Climate Change was released and second the year 2007 was the year immediately preceding the beginning of the first commitment period under the Kyoto Protocol, i.e. 2008–2012.

The Conference culminated in the adoption of the Bali Roadmap, which consists of a number of forward looking decisions that represent the various tracks that are essential to reaching a secure climate future. The Bali Roadmap includes the Bali Action Plan, which charts the course for a new negotiating process designed to tackle climate change, with the aim of completing this by 2009. The Principal outcomes of the Bali Conference were, first, a process to determine the greenhouse gas reduction commitments of industrialized countries under the Kyoto Protocol, beyond 2012. Second, the commencement of Bali Action Plan; a comprehensive

¹⁸*The Indian Express*, 31 October 2002.

dialogue on long-term cooperative action to address four major building blocks of climate change, i.e. mitigation of greenhouse gases; adaptation to climate change impacts; technology development and cooperation; and finance. In addition to this, several other significant decisions were also taken, particularly the operationalisation of the Adaptation Fund to provide assistance to developing countries to adapt to climate change.

The President of the Conference concluded with the remarks that ‘the decisions we have taken at Bali together create the world’s roadmap to a secure climate future. The governments assembled here have responded decisively in the face of new scientific evidence and significant advances in our thinking to collectively envision, and chart, a new climate secure course for humanity’ and called upon the nations to implement the existing commitments.

The Fourteenth Conference of the Parties was held at Poznan, Poland from 1 to 12 December 2008, which was considered to be a milestone on the road to success for the processes which were launched under the Bali Roadmap. The meeting had come midway between COP 13 in Bali which saw the launch of negotiations on strengthened international action on climate change and COP 15, Copenhagen, at which the negotiations are set to conclude. The Poznan conference which has drawn more than 11,000 delegates representing government, industry, civil society and international organizations, constitutes the halfway mark in the negotiations on an ambitious and effective international response to climate change to be agreed at Copenhagen at the end of 2009 and to take effect in 2013, the year after the first phase of the Kyoto Protocol expires.

To carry forward the negotiations, the world leaders met at Copenhagen in December 2009 to adopt practical measures with view to resolving the problem of climate change to the best of their abilities. The major thrust of the conference was to reset the goal to produce an ‘operationally binding political agreement’ on how and under what terms the actions needed to prevent global warming will be distributed among the 194 member countries. It was also hoped that ‘such an arrangement, which needs to be a major advance on the Kyoto Protocol within the parameters set by the United Nations Framework Convention on Climate Change (UNFCCC) will eventually lead to a fair, just and workable legal instrument’. The settlement was expected to be guided by the UNFCCC formulation of ‘Common and differential responsibilities and respective capabilities’. It was expected that this conference would arrive at suitable amendments to the Kyoto Protocol for the industrialized countries to undertake new emission reduction targets beyond the first commitment period of 2008–2012. But to the utter surprise of all, the conference concluded with a disappointing note without adopting any acceptable formula although it came out with document known as ‘Copenhagen Accord’ that promises to limit the rise in global temperatures to 2 °C.

Striking a surprise again, the world leaders at Cancun declared a breakthrough by renewing the confidence in the United Nations process negotiations and its ability to deliver a long-term commitment and short-term actions. Putting aside their differences, the countries reached a compromise that signalled their willingness to work together in tackling climate change.

From 26 November to 8 December 2012, the eighteenth Conference of the Parties was held at Qatar National Convention Centre, Doha which adopted an amendment to the Kyoto Protocol. The Doha amendment aimed to facilitate implementation of the Protocol after the first commitment period and include quantified emission limitation or reduction commitments for the second commitment period. It also approaches to address the loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity. Despite these commitments, the differences of the world leaders, i.e. the developing and the developed countries, were wide open as they could not arrive at a conclusion to address the threat of climate change to the satisfaction of all. However, one positive aspect of the conference was the agreement among the nations to extend the commitment period of the Kyoto Protocol by another 8 years. Thus, now the deadline is now set at 2020 by which all the member countries are required to reduce the greenhouse gas emissions.

If we take into consideration the outcome of all these major conferences held during the last two decades, one thing is clear that despite negotiations we have achieved nothing concrete. At the global level, the countries do share the concern pertaining to climate change and the potential threat to the prevailing ecosystem, but on the issue of emission reduction the developed and the developing countries greatly differ. As mentioned above we are on the terrifying crossroads of global environmental threat. We are in the 21st year of the Rio Conference and 41st year of the first ever conference on the human environment held at Stockholm. Despite several promises and programmes what we notice is that the climate situation instead of improving has declined to a great extent, which is evident from the recent dramatic changes in the climatic conditions.

5 What Can We Do

There was much debate in the recent past over whether human activity is influencing global climate. The Intergovernmental Panel on Climate Change in its Second Assessment Report¹⁹ concluded that ‘the balance of statistical evidence, when examined in the context of our physical understanding of the climate system, now points towards a discernible human influence on global climate’.²⁰ With the passing of every year, the impact on the atmospheric climate is becoming more and more apparent. We are witnessing and experiencing the changes that are taking place in the weather conditions. The climate is warming as a result of which there are alterations in the rainfall and temperature patterns. The world is in the midst of climate change and the situation is not going to change in the near future.

¹⁹The Second Assessment Report was submitted in 1996.

²⁰The Hindu Survey of the Environment, 1997, at 22.

If we analyse the foregoing discussions, it is clear that the climate change has severely affected the human being and the whole world at large. It has affected the poor disproportionately and the subsistence farmers around the world have experienced an unpredictable season and social problems which are directly linked with the higher temperature. The alterations in the global climate would result in large change in the ecosystem, disastrous disruption of livelihood, living conditions, human health and above all the economic activity. In the post-Rio Scenario, the richer countries responded unfavourably and inadequately to the concept of 'common but differentiated responsibility'.

Now in the changed scenario both the developed and developing countries should come forward and share the 'common but differentiated responsibility'. Thus we have to face the challenge and for the purpose we need to open up the process leading to further commitments and timetables to combat the adverse effects of climate change. One thing is clear that the climate has certainly undergone a change. What shape it will take in the future and what will be its impact on the human community is a debatable point. But in the present scenario taking into consideration the present day happening, we need to be more cautious and take necessary steps.

In the last couple of years, we have witnessed dramatic and unprecedented changes in the climate in several parts of the world. This year itself has given us many surprises so far as weather conditions are concerned. Hence, what is needed at this moment of crisis is to reshape the economic planning and reorient the strategies for growth and development and take appropriate socio-economic measures to face the pressure and address the challenges of sustainable development and climate change, of course, consistent with the provisions of the United Nations Framework Convention on Climate Change.

If we take into consideration the recent developments and the report mentioned at the outset, one thing is clear that the time has come that we cannot afford the infertile meetings which were held in the recent past. At the same time, we cannot also allow the international climate change regime comes to an end. The inability of the world leaders in the climate change negotiations to bridge the gaps between the developed and the developing countries particularly China and India confirms that the forecast made in the recent report may become a reality. President of Indonesia rightly remarked that 'we can negotiate about the climate, but we cannot negotiate with the climate'.²¹ Climate change affects everyone in different ways and we must try to solve the issue at our own level. Last few years continued with the related problems like malnutrition, food shortage, hunger, change in climatic conditions, melting of glaciers, loss of biodiversity and above all low production. To tackle this we need to manage effectively these challenging issues in a proper manner so as to keep the hopes alive. As rightly pointed out by Gro Harlem Brundtland 'you cannot tackle hunger, disease and poverty unless you can also provide people with a

²¹This remark was made in the sidelines of the Bali Conference held in December 2007, at Bali, Indonesia.

healthy ecosystem in which their economies can grow'.²² Climate change affects everyone in different ways and we must try to solve the issue at our own level. Global temperature and concentration of greenhouse gas are two basic issues which need to be addressed and with wide cooperation and by focusing mainly on the climate governance. For the purpose, we have to change our outlook so as to reshape the process of transformation and open the door to the age of green economics.

Thus, accepting and realizing the ground realities what is required is that both the developed and developing countries should work together and by cooperative action should face the challenge by creating an environment of trust and cooperation.

²²Quoted by Ahmed Djoghlaf in 'Protecting Biodiversity in Relation to Climate Change and Human Welfare', 6(11&12) *International Journal of Environmental Consumerism*, New Delhi, 2010 at 5.

Chapter 13

The Principle of Sustainable Development: International and National Perspectives

Ajendra Srivastava

1 Introduction

‘The Future We Want’ the outcome document of the Rio+20 United Nations Conference on Sustainable Development (the Rio+20 Conference)¹ states:

We recognize that poverty eradication, changing unsustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development. We also reaffirm the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development, and inclusive, and promoting the integrated and sustainable management of natural resources and ecosystems that supports, *inter alia*, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges.

¹See General Assembly Resolution A/Res/66/288, 11 September 2012. The Rio+20 Conference was held in June 2012 in Rio de Janeiro, Brazil.

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The above-quoted passage reaffirms the commitments made at the 1992 Rio Conference on Environment and Development.² It shows that the idea underlying sustainable development³ has undergone little change since it was given concrete shape at the 1992 Rio conference. Although there is near unanimity about the broad meaning of sustainable development, it does not clearly answer the question—in what manner exactly development needs and environmental protection should be balanced? Its two concomitant principles, namely polluter pays principle and precautionary approach principles tend to supply the answer to a certain extent, but the question largely remains unaddressed. A second important issue relates to the controversy surrounding the exact legal character of the principle of sustainable development. Many have questioned the normative value of the principle terming it at best a ‘soft law’.⁴ The present chapter is intended to explore these issues and find their answers. In particular, it argues that the view which holds that sustainable development is not a customary rule of international law ignores the modern approach regarding the formation of a custom in international law which relies more on *opinio juris* than state practice. The chapter is also aimed at focusing on the concerns of developing countries including India that arise in applying the principle fully and the initiatives taken towards implementation of the principle.

This chapter is structured as follows. In Sect 2, it focuses on the meaning and the underlying idea of the principle of sustainable development. Section 3 discusses the issue of normative quality of the principle. Section 4 is concerned with the concerns of developing countries in giving effect to this principle. In particular, this Part considers the application of sustainable development principle from Indian perspective and reviews the initiatives taken by the Government of India in recent years towards achieving the objectives of sustainable development. Section 5 is conclusion.

²The United Nations Conference on Environment and Development (UNCED) was held in Rio de Janeiro, Brazil from 3–14, June 1992.

³On Sustainable Development, see: *Our Common Future* (Oxford, 1987); Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development* (Oxford, 1999); Patricia Birnie and A. Boyle, *International Law and the Environment*, (Oxford, 2001), pp. 86–95; P. Sands, ‘International Law in the Field of Sustainable Development’, 65 *BYIL*, 1994, at 338; Nico Schrijver and Friedl Weiss (eds.) *International Law and Sustainable Development: Principles and Practice* (Mortinus Nijhoff Publishers, Leiden/Boston 2004); International Law Association (ILA), Report of the Sixty-ninth Conference (London, 2000); ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development 2002.

⁴For the view that sustainable development is not a norm of international law, see generally Vaughan Lowe, “Sustainable Development and Unsustainable Arguments”, in Alan Boyle and David Freestone (eds.), *International Law and Sustainable Development*, *Id.*, pp. 19–37. See also Ulrich Beyerlin and Thilo Matauhn, *International Environmental Law* (Hart Publishing Ltd., 2011), pp. 80–81.

2 Meaning, Underlying Idea and Elements of Sustainable Development

2.1 Linkage Between Environment and Development

As a notion, ‘sustainable development’ emphasizes a close relationship between development needs and the imperative of environmental protection. The notion has two components-development and the environmental protection. Sustainable development emphasizes the need to integrate environmental concerns into development agenda. As a principle of international law, it mandates that ‘development decisions to be the outcome of a process which promotes sustainable development’.⁵ There is little disagreement on the proposition that development should be sustainable and natural resources should be managed to equitably meet the needs of present and future generations. Principle 4 of the Rio Declaration well captures the underlying idea: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of development process and cannot be considered in isolation from it’. Principle 1 of the Rio Declaration is also instructive. It states that [h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with the nature’.

Sustainable Development, as a concept, involves the idea of interrelation of the environmental protection and development. It is in this sense that the World Commission on Environment and Development (WCED) defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.⁶

This definition emphasizes two principal elements: conservation of natural resources and fulfilling the developmental needs of developing countries. In more concrete terms, sustainable development implies sustainable utilization of natural resources and eradication of poverty. This perspective on sustainable development has gained universal acceptance as evidenced by numerous international legal instruments. The 1992 Rio Declaration on Environment and Development (the 1992 Rio Declaration),⁷ the Agenda 21,⁸ the 1992 Convention on Biological Diversity (the 1992 CBD),⁹ the 1992 United Nations Framework Convention on Climate Change (the UNFCCC),¹⁰ the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change (the Kyoto Protocol),¹¹ the 1994

⁵Alan Boyle and David Freestone, “Introduction” in Alan Boyle and David Freestone (eds.) *Id.*, at 17.

⁶*Our Common Future*, *supra* note 3, at 43.

⁷UN Doc. A/CONF. 151/26/Rev 1.

⁸Agenda 21: Programme of Action for Sustainable Development, UNCED, A/CONF 151/4; 11.

⁹31 ILM (1992) 818, In force 29 December 1993.

¹⁰*Id.*, 851, In force 21 March 1994.

¹¹37 ILM (1998) 32, In force 16 February 2005.

Convention to Combat Desertification in those Countries Experiencing Drought and/or Desertification (the 1994 Convention to Combat Desertification),¹² and the 2002 Johannesburg Declaration on Sustainable Development (the Johannesburg Declaration)¹³ are among those international instruments which incorporate the above said two elements.

Similarly, the 1992 Rio Declaration in emphasizing the need of eradicating poverty incorporates the idea of sustainable development. Principle 5 states that all states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standard of living and better meet the needs of the majority of the people of the world.

Preambular paragraph of the 2002 Johannesburg Declaration based on the Rio Principles also states that ‘the protection of the environment and social and economic development are fundamental to sustainable development’.

Much progress has been made in the field of environmental protection and development since the publication of the work of the WCED in 1987, but the idea behind sustainable development as advanced by it remained unchallenged and unchanged. Rather the basic tenets of the concept have been endorsed in numerous international legal instruments including those cited above.

The concept of sustainable development has come to be understood as providing the basis for reconciliation between social and economic development, and the protection of the environment. Principle 12 of the 1992 Rio Declaration states that states should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.

The influence of the WCED’s formulation of the concept of sustainable development is manifest in several international legal instruments in the field of environmental protection as they emphasize equally the need to promote developmental needs of the developing countries and to protect the environment. Principle 4 of the 1992 Rio Declaration shows the environment- development nexus in the following words: ‘[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’. It is no less significant a fact that the 1992 Rio Declaration reaffirmed the principles contained in the 1972 Declaration of the United Nations Conference on the Human Environment (the 1972 Stockholm Declaration).¹⁴ The latter is based on the environment development nexus though the idea of sustainable development had not originated at that time.

At this place, two remarkable developments may be noted. One is the emergence of the right to development and the other is the increasing use of the differential

¹²33 ILM (1994) 1016, In force 26 December 1996.

¹³The United Nations Report of the World Summit on Sustainable Development, A/CONF 199/20, available at: www.Johannesburgsummit.org. [accessed on February 12, 2013].

¹⁴UN Doc. A/CONF/48/14/Rev 1.

treatment in international environmental law as a matter of international law and policy. Though the legal status of the right to development is yet to be established, the concept is gaining recognition in the international arena.¹⁵ The 1986 Declaration on the Right to Development¹⁶ adopted by the United Nations General Assembly and the 1993 Vienna Declaration on Human Rights¹⁷ are two major international legal instruments which expressly asserts a right to development as a human right.¹⁸ The latter affirmed a right to development as a ‘Universal and inalienable right and an integral part of fundamental human rights’. The assertion of a right to development is significant as its realization is a precondition for achieving the goal of sustainable development. The 1993 Vienna Declaration on Human Rights states that the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.

Differential treatment in international law is order of the day.¹⁹ Particularly, in multilateral environmental agreements (MEAs) it has been widely relied upon. The principle which incorporates the essence of differential treatment in international environmental law is the principle of common but differentiated responsibilities (CDR).²⁰ The principle suggests that though all countries face certain common challenges their obligation in meeting those challenges should not be uniform. Some countries, ordinarily the rich should share more burden than others ordinarily the poor. In other words, the principle of CDR states that ‘states should be held accountable in different measure according to their respective historical and current contributions to the creation of global environmental problems and their respective capacities to address these problems’.²¹ In this sense, the developing countries should have fewer obligations than the developed countries.

Differential treatment also results in providing ‘implementation aid’ to foster the capacity of developing states to effectively implement their environmental

¹⁵On the right to development, see Philip Alston, “Making Space for New Human Rights: The Case of the Right to Development”, 1 *Harv. Human Rights*, 1988, pp. 3–40; and Rolend Rich, “The Right to Development as an Emerging Human Right”, 23 *Vand. JTL*, 1983, 287.

¹⁶UNGAOR, 41st Sess. Annex, Agenda Item 101, 97th plen. meeting, 1 UN Doc A/RES/41/ 128 (1987).

¹⁷Doc A/CONF/57/24 (Pt 1) (1993).

¹⁸The 1981 African Charter on Human and People’s Right, adopted on 27 June 181, 21 ILM 59 (1981) also explicitly recognizes right to development. Article 22 of the 1981 African Charter provides that “all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

¹⁹On differential treatment in international law, see: Philippe Cullet, *Differential Treatment in International Environmental Law*, (Ashgate, 2003).

²⁰On “common but differentiated responsibilities”, see Duncan French, Developing States and International Environmental Law: The Importance of Differentiated Responsibilities, 49 *ICLQ* 35 (2000); Christopher D Stone, Common but Differentiated Responsibilities in International Law 98 *AJIL* 276 (2004); Lavanya Rajamani, “The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime”, 9 *RECIEL*, 2000, at 120.

²¹Philippe Cullet, *supra* note 19, at 97.

obligations. Usually, this takes the form of funding and technology transfer mechanisms. The provisions for funding mechanisms and technology transfers in MEAs are a necessary component of sustainable development.

2.2 The Elements of Sustainable Development

The concept of sustainable development gained full recognition at the UNCED. The 1992 Rio Declaration, Agenda 21, the 1992 CBD and the UNFCCC which emerged out of UNCED incorporate the elements of sustainable development. To begin with the 1992 Rio Declaration, its very first principle states that: '[h]uman beings are at the centre of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature'. Sustainable development is the core theme of the 1992 Rio Declaration. It is significant to note that a global consensus was thrashed out at the UNCED on adopting the sustainable path of development. Mention should be made of the principles 3–8, 12 and 25 which capture very closely the essence of sustainable development. It would not be out of place to reproduce the texts of these principles.²²

Besides these, Principle 10 (public participation), Principle 15 (precautionary approach principle), Principle 16 (polluter pays principle) and Principle 17 (environmental impact assessment) are also important to consider as they give expression to different aspects of the principle of sustainable development.

Two broad themes are discernible from a reading of the 1992 Rio Declaration. (1) Environmental protection is an integral component of development process and

²²Principle 3: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations; Principle 4: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it; Principle 5: All states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world; Principle 6: The special situation and needs of developing countries, particularly the least developed and the most environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interest and needs of all countries; Principle 7: States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command; Principle 8: To achieve sustainable development and a higher quality of life for all people, states should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies; Principle 12: States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation; Principle 25: Peace, development and environmental protection are interdependent and indivisible.

(2) Eradication of poverty is essential for achieving the goal of sustainable development.

The first of the above said two elements emphasizes the integrated approach to the environmental protection and economic development. Agenda 21 also incorporate this integrated approach. It refers in its preamble to the need for a ‘global partnership for sustainable development’. Paragraph 16.22 of Chapter 17 provides very clearly that ‘environmental protection is an integral component of sustainable development’. Agenda 21 is set on achieving the goal of sustainable development as its most of the provisions incorporate the integrated approach to environment and development.

An integrated approach to the environmental protection and sustainable development was endorsed by the Nineteenth Special Session of the UN General Assembly. There are various other developments in international law which reflect an integrated approach to the environment and development. Integration of environmental concerns into development process and policies has become a central part of economic and environmental thinking at all levels. The UN Secretary-General’s *Agenda for Development* follows the integrated approach through its ‘five dimensions of development’: peace as the foundation, the economy as the engine of growth, the environment as the basis for sustainability, justice as a pillar of society, and democracy as good governance.

As a corollary of the integrated approach is the notion of sustainable utilization of natural resources to meet the needs of present and future generations. For that purpose, the unsustainable pattern of production and consumption have to be changed (Principle 8, the Rio Declaration). This requires cooperation on the part of all states to strengthen indigenous capacity building through exchange of scientific and technological knowledge (Principle 9, the Rio Declaration). However, the use of the word ‘should’ in Principles 8 and 9 suggest that obligations contained therein are permissive in nature. In fact, the 1992 Rio Declaration is more in the nature of a ‘package deal’ reflecting the interests of both developed and developing states.

It is important to note that the 1992 Rio Declaration reaffirmed the 1972 Stockholm Declaration which emphasized the improvement of the human environment in harmony with economic and social development. Emphasis on an integrated approach to the environment protection and development may be found in Principle 13 which states that in order to achieve a more rational management of resources and thus to improve the environment, states should adopt *an integrated and coordinated* approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population. The 1972 Stockholm Declaration by emphasizing the need to safeguard vital natural resources for present and future generation incorporates the elements of sustainable development.²³

²³Principle 2–6 of the 1972 Stockholm Declaration relate to conservation of natural resources and wildlife. And Principle 14 stresses the need to reconcile the needs of the environment and development.

The spirit of the 1972 Stockholm Declaration may be traced to the Charter of Economic Rights and Duties of States which declared the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as the resources of the area, as the common heritage of mankind. A necessary implication of declaring the Area as common heritage of mankind is that benefits arising out of the exploitation of the resources of it are to be shared equitably by all the states. In consonance of the spirit of the 1972 Stockholm Declaration, the Charter in Article 30 further declares that 'the environmental policies of all states should enhance and not adversely affect the present and future development potential of developing countries'.

Another dominant theme of the 1992 Rio Declaration is the emphasis on the need of the eradication of poverty. 'All states... shall cooperate in the essential task of eradicating poverty as an indispensable requirement of sustainable development'. The 1992 Rio Declaration declares that 'the special situation and needs of developing countries particularly the least developed and the most environmentally vulnerable shall be given special priority...'. Singing in tune with the 1992 Rio Declaration, Agenda 21 asserts that 'the promotion of economic growth in developing countries is essential to address problems of environmental degradation. It puts forward the idea that international economy should provide a supportive international climate for achieving environment and development goal. 'A supportive external economic environment is crucial'. Support can be extended mainly by (a) promoting sustainable development through trade liberalization; (b) making trade and environment mutually supportive and (c) providing adequate financial resources to developing countries and dealing with international debt. Agenda 21 calls for giving special attention to the particular circumstances facing the economies in transition. It acknowledges that the development and environment objectives, contained in it will require a substantial flow of new and additional financial resources to developing countries.

Stress on economic and social development side by side with the need to improve the environment is apparent in the 1972 Stockholm Declaration. Principles 8–12 assert that economic and social development is an essential tool for ensuring a quality environment and underscores the reality that under development poses a grave threat to the efforts directed towards improving the human environment.

An integrated approach to the environment and development may also be found in the CBD and the UNFCCC. Article 1 of the CBD sets out its aims as follows: (a) the conservation of biological diversity; (b) the sustainable use of its components and (c) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

The interrelation between the conservation of biodiversity, its sustainable use and the equitable sharing of benefits places the CBD within the framework of international efforts to promote sustainable development. During the negotiations on the CBD, conservation and sustainable use were acknowledged as separate, albeit mutually supportive, concepts. The CBD adopts a new approach to conservation of biological diversity as it brings forward the concept of 'sustainable use'. Significantly, the CBD integrates approaches to conservation and sustainable

utilization into one as is evident from a reading of Article 10(a) which provides for the integrated consideration of conservation and sustainable use into ‘national decision-making’. The emphasis on the need to meet people’s needs from biological resources while ensuring their sustainable is in tune with the integration approach which is a vital element of a sustainable developments. Further, Article 20(4) also sets out the element of sustainable development as it asserts that ‘the extent to which developing country parties will effectively implement their commitments under this convention will depends on the effective implementation by developed country parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country parties’. [emphasis supplied].

Other provisions of the CBD which are important in this respect are the provisions related to transfer of relevant technology and fund to developing countries. Article 16(1) commits nations to provide and/or facilitate access for and transfer to other Contracting Parties of technologies that are relevant to the conservation and sustainable use of biological diversity. Article 16(2) states that access and/or transfer of technology is to be provided to developing countries under fair and most favourable terms including on concessional and preferential terms. Also relevant to note are the provisions of Articles 20 and 21 of the CBD. Article 20(2) requires developed country Parties to provide new and additional financial resources to enable developing countries parties to meet the agreed full incremental costs to them of implementing measures which fulfill the obligations of this Convention and to benefit from its provisions. And Article 21 provides for a ‘mechanism for the provision of financial resources to developing country Parties... on a grant or concessional basis...’.

The concept of sustainable development lies at the heart of efforts to address climate change. The ‘Delhi Ministerial Declaration on Climate Change and Sustainable Development’ adopted at the Eighth Conference of Parties (COP8) states in its preamble that ‘Climate change and its adverse effects should be addressed while meeting the requirements of sustainable development’.

Article 3 of the UNFCCC asserts that each Party has a right to promote sustainable development. It also states that ‘policies and measures to protect the climate system against human induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes taking into account that economic development is essential for adopting measures to address climate change’. [emphasis supplied].

2.3 *The Concomitant Principles of Sustainable Development*

Certain principles of international law, such as the precautionary approach principle,²⁴ the polluter pays principle,²⁵ environmental impact assessment,²⁶ the principle of common but differentiated responsibilities,²⁷ the intergenerational equity,²⁸ sustainable utilization of resources²⁹ and the principle of public participation and access to information and justice³⁰ may be regarded the concomitant principles of sustainable development as their pivotal role in attainment of the objectives of sustainable development is recognized in various international instruments and writings of the publicists. The fact that these principles were enshrined in the 1992 Rio Declaration in itself suggests their close affinity with sustainable development. The ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2002 emphasizes that the application and, where relevant, consolidation and further development of the following principles of international law would be instrumental in achieving the objectives of sustainable development: (1) The duty of States to ensure sustainable use of natural resources; (2) The Principle of equity and eradication of poverty; (3) the Principle of common but differentiated responsibilities; (4) The principle of the precautionary approach to human health, natural resources and ecosystems; (5) The principle of public participation and access to information and justice; (6) the principle of good governance and (7) The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectivities.³¹

²⁴The Rio Declaration, Principle 15: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

²⁵*Id.*, Principle 16: “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting International trade and investment”.

²⁶*Id.*, Principle 17: “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority”.

²⁷*Id.*, Principles 6 and 7 (see *infra*).

²⁸*Id.*, Principle 3.

²⁹*Id.*, Principle 8 (see *infra*).

³⁰*Id.*, Principle 10: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”.

³¹For the text see UN Doc. A/CONF.199/8,9 August 2002. The text is also available at: www.ila-hg.org.

3 Normative Status of the Principle of Sustainable Development

Principle of sustainable development has found expression in number of international instruments since the 1992 Rio Declaration showing the growing recognition of the principle. In fact, since 1992 the integration of environmental and developmental goals has been the central element in the international law-making process. The principle is central to the two other important outcomes of the Rio Conference, namely the 1992 United Nations Framework Convention on Climate Change (the UNFCCC)³² and the 1992 United Nations Convention on Biological Diversity (the UNCBD).³³ Article 3(4) provides that parties have a right to, and should, promote sustainable development. In a similar vein, the UNCBD emphasizes the importance of sustainable use of biological resources. Article 10 of the Convention provides that each Party ‘shall as far as possible and as appropriate, integrate consideration of conservation and sustainable use of biological resources into national decision making’.

Reference to the principle of sustainable development may also be found in the 1997 Kyoto Protocol to the UNFCCC.³⁴ Article 2 of the Protocol put all countries listed in Annex I (i.e. developed countries and countries which are undergoing the process of transition to market economy) to promote sustainable development while achieving their quantified emission limitation and reduction commitments. Another Article which makes a clear reference to sustainable development is Article 10 of the Protocol. Article 10 states: ‘All Parties, taking into account their common but differentiated responsibilities and specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments in Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention, shall...’. Mention may also be made of the 1994 Convention to Combat Desertification in those Countries Experiencing Drought and/or Desertification³⁵ which explicitly endorses the principle of sustainable development when it affirms that sustainable economic growth, social development and poverty eradication are priorities of affected developing countries, particularly in Africa, and are essential to meeting sustainability objectives. In a similar vein, Article 24 of the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses³⁶ provides that watercourse

³² Adopted on 9 May 1992, For the text, see 31 ILM 894 (1992) In force 21 March 1994.

³³ Adopted on June 5, 1992, For the text, see 31 ILM 818 (1992). In force 29 December 1993.

³⁴ Adopted on December 11, 1997, For the text see 31 ILM 32 (1998).

³⁵ Adopted on June 17, 1994, For the text, see 31 ILM 1016 (1994) In force since 26 December 1996.

³⁶ See UN Doc. A/51/869 (1997).

States shall enter into consultation concerning the planning of the sustainable development of international watercourses.

Integration of environmental protection and economic development has also been recognized by certain regional conventions including the 1978 Treaty for Amazonian Cooperation,³⁷ the 1978 Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution³⁸ and the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources.³⁹

It is important to note that in *Gabcikovo-Nagymarous* case,⁴⁰ the International Court of Justice relied on the principle of sustainable development. To hold that newly developed norms of the international environmental law are relevant for the implementation of the Treaty of 1977 entered into by the Parties and that the Parties could, by agreement, incorporate them through the application of the several of its articles. The Court held that by reason of its wide and general acceptance by the global community, sustainable development has become a settled principle of international law. It is pertinent to note the following observation of the court:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.⁴¹

The ICJ further held:

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.⁴²

Facts of the *Gabcikovo-Nagymarous* case may briefly be stated thus: Under the 1977 Treaty between Hungary and Czechoslovakia (as it then was), the Parties agreed on a joint project to build hydroelectric facilities and improve navigation and

³⁷ 17 ILM 1045 (1978), Preamble.

³⁸ 17 ILM 511 (1978), Preamble.

³⁹ 15 EPL 64, (Article 1, paragraphs 1 & 2)-Article 1(1) provides that: "The Contracting Parties, within the framework of their respective national laws, undertake to adopt singly, or where necessary and appropriate through concrete action, the measures necessary to maintain essential ecological processes and life-support systems, to preserve genetic diversity, and to ensure the sustainable utilization of harvested natural resources under their jurisdiction in accordance with scientific principles and with a view to attaining the goal of sustainable development".

⁴⁰ *Gabcikovo-Nagymarous Project, Hungary v. Slovakia*, Judgment, ICJ Reports, 1997, at 7.

⁴¹ *Id.*, at 78.

⁴² *Ibid.*

flood control on the river Danube. In 1989, Hungary suspended, and later, abandoned, work on agreed project because, because of alleged serious criticisms of the environmental impact of the project. In 1991, Slovakia acted unilaterally to implement a variant of the project, dramatically reducing the water flow in the Danube. Hungry protested and in 1993 both Parties agreed to refer the dispute to the ICJ. The Court found that Hungry was not entitled to suspend and subsequently abandon its part of the works in the dam project as laid down in the 1977 Treaty. It also found that Czechoslovakia was entitled to start in 1991 preparation of an alternative provisional solution but not to put that solution into operation in October 1992 as a unilateral measure.

While the majority judgment has not explicitly accepted sustainable development as a binding legal principle as it has referred ‘sustainable development’ as a concept only, the separate judgment of Judge Weeramantry clearly admits sustainable development as a legal principle. The following observation by Judge Weeramantry is significant: ‘...I consider it to be more than a mere concept, [it is] ...a principle with normative value’. He also stated: ‘[t]he principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community’.

A clear cut recognition of the principle of sustainable development is found in decisions of the Supreme court of India. In *Vellore Citizens' Forum v. Union of India*,⁴³ the Supreme Court found sustainable development as a principle of customary international law and as such part of the law of the land. ‘We have no hesitation in holding that “Sustainable development” as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalized by the international law jurists’.⁴⁴ Referring to the constitutional and statutory provisions, and previous decisions, the Court further held: ‘...we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country’.

However, some scholars have seriously questioned the normative quality of sustainable development. They take the position that sustainable development is not a legally binding norm of law.⁴⁵ Vaughan Lowe argues that sustainable development is not a binding norm of international law in the sense of the ‘normative logic’ of traditional international law as reflected in Article 38(1) of the Statute of International Court of Justice ‘but that there is a sense in which the concept of sustainable development exemplifies another species of normativity which is of great potential value in handling of concepts of international environmental law’.⁴⁶ Lowe is critical of the approach adopted by judge Weeramantry in the *Gabcikovo*

⁴³AIR 1996 SC 2715.

⁴⁴*Id.*, at 2724.

⁴⁵See Ulrich Beyerlin and Thilo Matauhn, *supra* note 3.

⁴⁶Vaughan Lowe, *supra* note 4, at 21.

judgment that the repeated references to the concept of sustainable development in multilateral treaties, international declarations and the planning documents are an evidence of the concept's translation into customary international law. 'There may be evidence of the frequent use of the term; but that is by no means the same as evidence of a general practice accepting the concept as law'.⁴⁷ He further argues, although sustainable development 'looks like a convenient umbrella term to label a group of congruent norms, it is itself not a norm; it can be no more than a name for a set of norms.'

Lowe's thesis that sustainable development cannot be viewed as a norm of customary international law because it does not possess the normative quality as not supported by state action ignores the modern approach to customary international law. As Anthea Elizabeth Roberts has shown, 'modern custom is derived by a deductive process that begins with general statement of rules rather than particular state practice'.⁴⁸ Hence, a decision whether a particular concept is part of customary international law or not depends on factors such as the phrase used in declaring a term, support of a widespread and representative body of states and state practice.⁴⁹

4 Sustainable Development: National Perspective

As discussed earlier, the underlying idea of sustainable development is that there is the need to strike a right balance between the competing interests of development and the environmental protection. But Developing countries faced with the problems of acute poverty, food insecurity, poor infrastructure and insufficient funds to run welfare programmes are tempted to give preference to development over environmental priorities. Development imperatives prevent them from implementing sustainable development policies. Furthermore, for most developing countries the objective of sustainable development is unrealizable without massive financial or technical assistance from developed countries. The problems raised by developing nations call for concerted international efforts and refined international rules of conduct that give expression to the fact that all nations have a stake in maintaining ecological stability in less developed countries.⁵⁰ The developing countries suffer more acute environmental and development hardship in view of their specific needs and vulnerability to adverse effects of environmental change. The rapid diminishing vital resources in these countries are pregnant with devastating consequences. Tribals, forest dwellers and small farmers are left with no option but to

⁴⁷*Id.*, at 24.

⁴⁸See Anthea Elizabeth Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", 95 *AJIL* 757, 2001, at 758.

⁴⁹*Id.*, at 758.

⁵⁰Gunther Handl, "Environmental Protection and Development in Third World Countries," 20 *New York University Journal of Int'l Law & Pol.*, 1988, at 610.

exploit forests in order to feed them. The growing number of people substantially reduces the prospects for sustainable agriculture. Population growth represents a stark conflict. This tends to result into widespread poverty that pollutes the environment. Development projects ostensibly aimed at conquering the scourge of poverty frequently endanger the very natural resource base upon which the long-term prospects of social well-being rest. Population pressure also results into increased use of energy and deforestation which only exacerbate the situation. Thus, developing countries, in general, face a different problem. For them, national development, that is, ‘economic growth in absolute terms’ is not an option but necessity.⁵¹

4.1 Compulsion of Rapid Economic Growth and the Challenges of Sustainability

Faced with economic deficiencies, India, like other developing countries, is tempted to give preference to economic development over environmental protection. India is one of the fastest growing economies of the world. The Twelfth Five Year Plan (2012–2017) projects the growth rate of the country around 8% amidst global economic slowdown. The projected growth rate of the previous 5-year plan period was 9%.⁵² Although the declared growth rate is around 8%, in the long run, the Plan aims to achieve a double-digit growth. During the Plan period (2012–2017) the manufacturing sector is projected to achieve around 7% of growth while over the years, the Plan aims to achieve a double-digit growth in industrial sector.⁵³ According to the Twelfth Five Year Plan, India’s first priority is rapid economic growth although at the same time it emphasizes that the growth should be both-inclusive as well as sustainable.⁵⁴

Twelfth Five Year Plan gives two reasons for focusing on the gross domestic product (GDP) growth. First, rapid economic growth of GDP produces a larger expansion in total income and production which, if the growth processes sufficiently inclusive, will directly raise living standards of a large section of population by providing them with employment and other income enhancing activities. Second, it results in higher revenue which helps the Government to finance welfare programmes across the country.⁵⁵

⁵¹*Id.*, at 607.

⁵²*Twelfth Five Year Plan (2012–2017): Faster, More Inclusive and Sustainable Growth*, Vol. I, Planning Commission, Government of India, 2013.

⁵³*Id.*, at 41.

⁵⁴*Id.*, Foreword, iv.

⁵⁵*Id.*, at 3.

4.2 Executive Initiatives

Twelfth Five Year Plan affirms India's commitment to sustainable development. It states: '[e]conomic growth and development have to be guided by the compulsion of sustainability, because none of us has the luxury, any longer, of ignoring the economic as well as the environmental threat that a fast-deteriorating ecosystem poses to our fragile planet. None of us is immune to the reality of climate change, ecological degradation, depletion of the ozone layer and contamination of our freshwater'.⁵⁶ The Plan recognizes that measuring GDP in terms of production does not reflect externalities, such as environmental damage caused by production of goods and services and states that the Planning Commission has commissioned an Expert Group under to prepare a template for estimating green national accounts, which would measure national production while allowing for the negative effects on national resources.⁵⁷ In recent years, the Government of India has imposed coal cess as a form of environmental tax mainly to deter environmentally harmful activities.⁵⁸ The levy of green taxes needs to be supported as it is intended to implement the 'polluter pays' principle which is a concomitant principle of sustainable development. The setting up of the National Clean Energy Fund in 2010 by the Government of India is one more step in right direction which will support projects, programmes and policies that promote clean energy technologies.

Some other initiatives taken in recent years by the government of India also deserve mention. One such development is the adoption of the National Environmental Policy (NEP) in the year 2006.⁵⁹ NEP is based on the idea of sustainable development. It declares that only such development is sustainable which, respects ecological constraints and the imperatives of social justice. Its three foundational aspirations which capture the spirit of sustainable development are: first, that human beings should enjoy a decent quality of life; second, that human beings should become capable of recognizing the finiteness of the biosphere; and third, that neither the aspiration of a good life, nor the recognition of the limits of the biophysical world should preclude the search for greater justice in the world.

Similarly, the National Action Plan on Climate Change (NAPCC) was adopted in 2007 to deal with the problem of climate change. On 30 June 2007, the Prime minister released NAPCC which is a first policy statement over climate change. The Plan identifies eight core national missions running through 2007: (1) National Solar Mission; (2) National Mission for Enhancing Energy Efficiency; (3) National Mission for Sustainable Habitat; (4) National Water Mission;(5) National Mission for Sustaining the Himalayan Ecosystem; (6) National Mission for Green India; (7) National Mission for Sustainable Agriculture; and (8) National Mission on

⁵⁶*Id.*, at 112.

⁵⁷*Id.*, at 113.

⁵⁸*Id.*, at 114.

⁵⁹Available at: <http://envfor.nic.in/nep/nep2006.html>. [accessed on February 18, 2013].

Strategic Knowledge on Climate Change.⁶⁰ Furthermore, in 2011 the Prime Minister of India approved the National Mission for a Green India, which is aimed to adding 10 million hectares to the country's afforested areas by 2020. The objective is to enable forests to absorb 50–60 million tons of carbon dioxide annually, offsetting about 6% of India's annual emissions of carbon dioxide.⁶¹ The establishment of nuclear plants for electricity generation is also aimed at leading the country to the path of sustainable development.

However, the increasing use of fossil fuel is a matter of concern. In order to meet increasing demand of energy due to rapid industrialization and unsustainable growth of automobile sector, the use of fossil fuels is now moving towards a peak. The Central Government is providing heavy subsidy to diesel which is meant to be used for transportation of essential goods, public transport and agriculture. Heavy subsidy on diesel not only has distorted the use of energy in transport and industry it also poses threat to the environment. Further, in the absence of dual pricing system, a significant portion of the subsidy passes to passenger car users and the telecom operators. 15% of the total subsidized diesel is used by the passenger car owners.⁶² What is even worse is that the Government is providing subsidized diesel to profit-making telecom sector for running mobile towers.⁶³ Green house gas (GHG) emissions from the transport sector have also grown at 4.5% per annum between 1994 and 2007.⁶⁴ Ignoring the negative impact of the burning of fossil fuels is incompatible with the principle of sustainable development.

Indian industry is one of the largest in the world and is also one of the largest consumers of energy in the country; its total consumption of energy accounts for the 38% of total energy use of the country.⁶⁵ India is the fourth largest consumer of global industrial energy, surpassed only by China, the United States and Russia. However, its share is only 5% of total consumption of industrial energy worldwide.⁶⁶

Other areas of concern include the rapidly diminishing vital resources in the country and population growth. These two factors are primarily responsible for widespread poverty that pollutes the environment forming a vicious circle. Development projects ostensibly aimed at addressing the scourge of poverty frequently endanger the very resource base upon which the survival of future generations depend. The location of industries, creation of special economic zones,

⁶⁰See, Raj Chengappa, 'Global Warming: What India should do', *India Today*, July 14, 2008, pp. 40–44.

⁶¹*Sustainable Development in India: Stocktaking in the run up to Rio+20*, Ministry of Environment and Forests Government of India, 2011, at 18.

⁶²“A bumpy road to green growth”, *The Hindu*, New Delhi edition, June 3, 2012, at 4.

⁶³“End diesel subsidy for running mobile towers”, *Id.*, 19 May 2012, at 16.

⁶⁴Twelfth Five Year Plan, *supra* note 51.

⁶⁵*Id.*, 51 at 122.

⁶⁶*Ibid.*

infrastructure projects in rural areas and the building of large dams stand as examples of tension between economic development and the protection of the environment.

4.3 Legal Framework for Sustainable Development and Judicial Response

Amidst the growing concern over the state of the environment since the beginning of the 1960s, many important environmental statutes were enacted in the country, namely the Water (Prevention and Control of Pollution) Act, 1974 (the Water Act); the Air (Prevention and Control of Pollution) Act, 1981 (the Air Act); and the Environment Protection Act, 1986 (EPA). The Air Act and the EPA were passed with a view to implementing the decisions reached at the Stockholm conference. Two more important legislations were enacted in the early 1990s, namely Public Liability Insurance Act, 1991 (the PLIA, 1991) and the National Environment Tribunal Act, (the NETA, 1995). Other important legislations include the Wildlife (Protection) Act, 1972 and the Forest Conservation Act, 1980. Of these, the EPA is most comprehensive which is not limited to a particular sector of the environment. It is umbrella legislation with threefold objective: (i) protection of the environment (ii) improvement of the environment and (iii) prevention of hazards to human being, other creatures, plants and property. A series of rules and notifications were enacted to implement the provisions of the Act. Of these, the Hazardous Wastes Rules, 1989 which were comprehensively amended in 2000 and 2003 and the Environment Impact Assessment (EIA) Notification, 1994 deserve specific mention. Under the EIA notification of 1994, EIA is mandatory for 29 different activities. A major amendment to the EIA notification was made in 2006 under which EIA is necessary for environmental clearance for number of activities and industries.

Post-Stockholm, in 1976, the Constitution of India was also amended and Articles 48 A and 51 A were inserted in Chap. 4 'Directive Principles of State Policy' of the Constitution. Article 48 A states that '[t]he State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'. Article 51 A (g) makes it the fundamental duty of every citizen of India 'to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures'. By 1976 (Forty-second Amendment) Act, 1976 two subjects-forests (entry 17 A) and Protection of wild animals and birds (entry 17 B) were shifted from the State List to the Concurrent list of the Seventh Schedule of the Constitution.

The Supreme Court of India in *State of Tamil Nadu v. Hind Store*⁶⁷ held that Articles 48 A and 53 A together put the State as well as the citizens under the legal obligation to conserve, protect and improve the environment, with every generation owing a duty to all succeeding generations to develop and conserve the natural resources of the nation in the best possible way. Further, the Supreme Court has interpreted the scope of Article 21 of the Constitution which guarantees the fundamental right to life and personal liberty to include within its ambit the right to a healthy environment.⁶⁸

Some other landmark judgments of the Supreme Court which are important to refer in the context of present discussion include the *Indian Council for Enviro-Legal Action v. Union of India*,⁶⁹ in which the ‘polluter pays’ principle was held to be a sound legal principle,⁷⁰ the *Vellore Citizens’ Forum v. Union of India*⁷¹ in which it has expressly accepted ‘sustainable development’ and its concomitant principles, namely ‘polluter pays’ and ‘precautionary approach’ principles as part of the law of the land, *A.P. Pollution Control Board v. Professor M. V. Nayudu II*,⁷² which explained the meaning of ‘precautionary approach’ principle and *M. C. Mehta v. Union of India*⁷³ which held that the EIA is necessary to be done before any mining activity could be permitted.

5 Conclusion

Although there is a broad consensus as to the meaning of sustainable development as a concept of international law, the term is susceptible to varied explanations. The principle needs more clarity to make it an action oriented principle. Its concomitant principles need to be more vigorously adopted in policies and actions to achieve the objectives of sustainable development. Further, considerable controversy exists as to the customary law status of the principle and the case law also provides little insight into the legal character of principle. However, there is much in favour of assuming that the concept has normative quality and is eligible for gaining the status of customary international law. In the present state of law, its status as a

⁶⁷AIR 1981 SC 711.

⁶⁸See *Subhash Kumar v. State of Bihar* AIR SC 420 (Right to live... includes the right to enjoyment of pollution free water and air...”) *Id.*, at 424; *Virendra Gaur v. State of Haryana*, 1995 2 SCC 577 (“Therefore, hygienic environment is an integral facet of life and it would be impossible to live with human dignity without a healthy environment.”) *Id.*, at 580; and *AP Pollution Control Board v. Professor M.V. Nayudu (II)*, (2001) 2 SCC 62.

⁶⁹(1996) 3 SCC 212.

⁷⁰In that case, the Court interpreted the polluter pays principle to mean that “the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restraining the environmental degradation”.

⁷¹*Supra* note 43.

⁷²(1999) 2 SCC 718.

⁷³2004 (12) SCC 118.

principle to guide state actions in the environmental decision making cannot be doubted. In India, the Courts have clearly recognized the legal status of the principle of sustainable development and some subordinate norms which emanate from it. They have consistently taken the position that sustainable development as well its subordinate principles, namely the precautionary approach principle, polluter pays principle, intergenerational equity principle are part of the law of the land and should be given effect to by the legislative and executive organs of the State.

Part III

Trade Law

Chapter 14

Globalization, International Human Rights Law and Current Economic Crisis

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1 Introduction

Starting from 1980s, the current wave of ‘globalization’¹ began to engulf the world economy first as a result of liberalization of trade in the developing countries under the leadership of the International Monetary Fund (IMF) in terms of Structural Adjustment Programme (SAP) and then because of the necessary impetus being provided by tariff reduction negotiations under several rounds of the General Agreement on Tariffs and Trade (GATT).² The globalization movements, however, became a powerful force in international economic relations only when the World Trade Organization (WTO) was established under the 1994 Marrakesh Agreement.³

¹Globalization means the ‘free flow of capital and the removal of trade barriers between States, as well as the accompanying cultural transformation and exchanges’, Barbara Stark, “Women and Globalization: The Failure and Post modern Possibilities of International Law”, 33 *Vanderbilt Journal of International Law*, 2000, at 508; Zygmunt states: ‘the deepest meaning conveyed by the idea of globalization is that of the indeterminate unruly and self propelled character of world affairs, the absence of centre of a controlling desk of a board of directors. It is new world disorder with another name’, quoted in Arzabe, “Human Rights, A New Paradigm”, in Genugten and Perez Bustillo (ed), *The Poverty Of Rights* (2001), at 29 and pp. 36–37; According to some observers globalization is in reality Americanization, it is a stratagem, defined by Washington to make the World Safe for US. and Allied Capital, See. P. Balkrishnan, “Globalization True and False”, *The Hindu*, 20 August 2001; Globalization from above has inadvertently nurtured globalization from below. See generally Richard Falk, “The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society”, 7 *Transnational Law and Contemporary Problems*, 1997, pp. 335 and 337; Falk, “The Challenge of Genocide and Genocidal Politics in an Era of Globalization” in Dunne and Wheeler (eds.), *Human Rights in Global Politics* (1999), pp. 177–184; On transnational civil Society see Mary Caldor, “Transnational Civil Society”, in Dunne and Wheeler (ed.) *Human Rights in Global Politics*, at 195; According to Giddens, globalization is also an ‘in here phenomenon’, “Affluence, Poverty and the Idea of a Post Scarcity Society”, 27 *Development and Change*, 1996, note 61. There exists a symbiotic relationship between ‘globalization from above’ and ‘globalization from below’. See Bengoa, *Final Report, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Relationship between the Enjoyment of Human Rights in Particular, Economic, Social and Cultural Rights, and Income Distribution*. E/CN.4/Sub.2/1997/9 at 32; For the meaning, definition and consequences of globalization for international law, human rights and state structure, see B.C. Nirmal, “Sovereignty in International Law”, 3 *Soochow Law Journal*, 2006, pp. 1–51 and 41–48; see also, B.C. Nirmal, ‘The Eradication of Poverty in the Era of Globalization: A Human Rights Perspective’, 48 *IJIL*, 2008, pp.587–613; B.C. Nirmal ‘Sustainable Development, Human Rights and Good Governance’ in J.L. Kaul (eds.), *Human Rights and Good Governance* (2008), pp. 1–31.

²Sunanda Sen, “Globalization and Development”, in Cosimo Perrotta and Claudia Sunna (eds.), *Globalization and Economic Crisis* (Perrot Universita, Del Salento, 2013) at 44, available at: <http://siba-ese.unisalento.it/index.php/gec/article/download/12809/11422>. [accessed on November 26, 2013].

³See Uruguay Round Agreement, Marrakesh Agreement Establishing the World Trade Organization, available at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm. [accessed on November 26, 2013]; For details see, A.K. Kaul, *The General Agreement on Tariffs and Trade (GATT/World Trade Organization): Law, Economics and Politics* (Satyam, New Delhi); Critique of the WTO Dispute Settlement Mechanism, see B.C. Nirmal, “WTO Dispute Settlement System and Developing Countries”, 34 *The Banaras Law Journal*, 2005, pp. 33–62.

The accelerating pace of globalization process today not only owes its origins in the rules-based multinational trading system created under the WTO regime but continues to depend on the WTO and the other major agents of globalization for its sustenance, vigour, vitality and strength. Although World Bank, International Monetary Fund, multinational corporations and investment firms are also the other agents of globalization, it is the WTO which has provided an institutional forum and normative tools for the acceleration of the globalization process.

New wave of globalization, when started promised among other things poverty reduction and equitable distribution of income between countries. Even the WTO which institutionalized globalization of trade and sciences, had set out for itself following objectives: (i) to ensure the conduct of the international economic relations with a view to raising standard of living, ensuring full employment and a large and steadily growing volume of real income and effective demands, (ii) to expand the trade in goods and services and (iii) to allow for the optimum use of the world's resources in accordance with the objectives of sustainable development, seeking both to preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of environment.

While the new pattern of globalization has been under a scathing attack from its critics on a variety of grounds from the very beginning, the recent economic crisis, which is still not over has provided a powerful ammunition to them to assert that it has not only failed in the fulfillment of its objectives but has virtually become a spent force. Although globalization apologists have come out with equally forceful arguments in defence of globalization, it is difficult for latter to glass over the fact that 'globalization today has brought in greater socio-economic disparity which, in the countries with a representative governments, has led to open discontent in society'.⁴

Studies suggest that in today's globalization, influence of the powerful advanced economics on multilateral institutions has played a part in determining policies which favour the nations in the advanced regions. It is therefore not a surprise to witness the failure of free markets as a hallmark of globalization to end unemployment and poverty. The legal protection of 'human rights'⁵ at international,

⁴Sunanda Sen, *supra* note 2.

⁵For a partial list of literature on human rights, see, H. Lauterpacht, *International Law and Human Rights* (London, 1950); M.S. McDougal, H. Lasswell and L.C. Chen, *Human Rights and World Public Order* (New Haven, 1980); W. Laquer and B. Rubin (eds.), *Human Rights Reader* (London, 1977); A. H. Robertson and J. Merrills, *Human Rights in the World* (Manchester, 4th ed., 1996); A. Casse, *International Law* (Oxford, 2001); H. Hannum, *Guide to International Human Rights Practice* (Philadelphia, 2nd ed., 1992); J. Donnelly, *International Human Rights* (Boulder, 1993); D. R. Forsythe, *Human Rights in International Relations* (Cambridge, 2000); H. Steiner and P. Alston, *International Human Rights in Context* (Oxford, 2nd ed., 2000); Mark Gibney, *International Human Rights Law: Returning to Universal Principles* (Rowman & Littlefield Publishers, 2008); Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights Law: Law, Politics, Morals: Text and Materials* (Oxford University Press, US, 2008); See Generally, Thomas Buergenthal, "International Human Rights Law and Institutions:

regional and national levels cannot remain unaffected by these negative developments because rights and freedoms set forth in the Universal Declaration of Human Rights, 1948 and other human rights treaties and covenants require for their realization an enabling and conducive social and international order.⁶ It therefore becomes necessary that the impact of globalization on human rights is re-assessed and re-examined. As part of this exercise, this chapter looks at the meaning, definition and forms of globalization and challenges it poses with regard to protection of human rights.

2 Emerging Dimensions of Globalization

2.1 Meaning and Definition

Globalization is the buzzword in all walks of international life. Yet, surprisingly, the term is imprecise, and apprehensions and speculations about globalization are rife. If for its supporters, it epitomizes progress, prosperity and well-being; its detractors hold it responsible for the pain, sufferings and miseries of developing countries and people living there. It obviously evokes mixed feelings-glee, joy and hopes on the one hand, and sorrow, anger, hatred, fear and the like on the other. At the conceptual level, globalization is nothing but a further ‘stretching of time-space distanciation’.⁷ As Mary Kaldor points out, ‘more aspects of the lives of individuals are influenced by events taking place further and further away in time and space’.⁸ Globalization may, therefore, be defined as ‘the process by which a given local condition or entity succeeds in expanding its reach over the globe and by doing so, develops the capacity to designate a rival social condition or entity as local under its impact’.⁹ Globalization, it is said, is not a function of ‘a discrete set of factors but of “chaotic” currents of change’.¹⁰ This process is so dramatic and bewildering in its

(Footnote 5 continued)

Accomplishments and Prospects”, 63 *Washington Law Review*, 1988, at 1; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); Asbjorn Eide et al., *The Universal Declaration of Human Rights—A Commentary* (1992). For principles proposed by expert non-governmental bodies, See Siracusa, “Principles on the Limitation and Derogation Provisions in the Internal Covenant on civil and Political Rights”, 7 *Human Rights Quarterly*, 1985, at 83; The Paris Minimum Standards for Human Rights Norms in States of Emergency, reprinted in 79 *American Journal of International Law*, 1985, at 1072; and the Turku/Abo Declaration on Minimum Humanitarian Standards, 1990 (revised in 1994).

⁶The Universal Declaration of Human Rights, 1948, Article 28.

⁷See Anthony Giddens, *The Consequences of Modernity* (1990).

⁸Mary Kaldor, ‘Transnational Civil Society’ in Dunne and Wheeler, (eds). *Human rights and Global Politics* (1999), at 207.

⁹Santos, “Oppositional Postmodernism and Globalizations”, 23 *L & Society Inquiry*, 1998, at 135.

¹⁰See generally, David Harvey, *The Condition of Post modernity: An Enquiry into the Origins of Cultural Change* (1998), at 44.

impact that ‘everything fixed and frozen’ is ‘swept away’ and ‘all that is solid melts into air.’¹¹ It introduces unending unpredictability and uncertainty in the society.

Contrary to popular belief globalization is not quite a new phenomenon and various authors trace it to different events in human history. Thus, George Bitros claims that globalization ‘started since unmemorable times when people in country sent their goods by land or sea to other countries to exchange them with other products they did not produce but wished to have’.¹² The conventional history, however, is to trace the first wave of global, economic integration witnessed during period that ran from 1870s to the First World War.¹³ According to another view globalization in its earlier incarnation can be traced to ‘the imperial order, when colonies were linked to the ruling nations both politically and along economic channels’.¹⁴ Regardless of differing views on the origin and genesis of globalization it is undisputable that globalization today is more sweeping than the earlier pattern of globalization. In the past globalization was driven by the considerations of political domination, while economic considerations have been at the heart of the current wave of globalization.

2.2 Forms of Globalization

Globalization has manifold forms and diverse dimensions, viz. globalization of trade, globalization through Direct Foreign Investment (DFI), or multinationals, financial globalization, globalization of cross-border flows of humanity, globalization of technology diffusion and the issues of patents.¹⁵ For the purpose of present chapter here only three forms of globalization shall be discussed: economic globalization, globalization of culture and financial globalization.

(a) Economic Globalization

While globalization is a broader concept, the current trend of globalization is too narrow, limited to economic globalization and the accompanying cultural

¹¹Josef Joff citing, *The Communist Manifesto*, referred to in Barbara Stark, “Women and Globalization: The Failure and Post modern Possibilities of International Law”, 33 *Vanderbilt Journal of Transnational Law*, 2000, at 510.

¹²George Bitros, “In Defense of Globalization”, in Cosimo Perrotta and Claudia Sunna (eds.), *Globalization and Economic Crisis*, (Perrot Universita, Del Salento, 2013), at 62, available at: <http://siba-ese.unisalento.it/index.php/gec/article/download/12809/11422>. [accessed on November 26, 2013].

¹³Claudia Sunna, “Reconstructing the Debate on Globalization and Economic Crisis”, in Cosimo Perrotta and Claudia Sunna (eds.), *Globalization and Economic Crisis* (Perrot Universita Del Salento, 2013), pp. 5–20, at 5, available at: <http://siba-ese.unisalento.it/index.php/gec/article/download/12809/11422>. [accessed on November 26, 2013].

¹⁴Sunanda Sen, *supra* note 2.

¹⁵J. Bhagwati, “Can We Still Defend Globalization after The Current Crisis?”, *Economic Report*, 2013, at 89.

globalization. In this narrow sense globalization means the ‘free flow of capital and the removal of trade barriers between states, as well as to accompanying cultural transformation and exchanges.’¹⁶ While capitalist economy has always been global and for most of Western history capital has flowed freely,¹⁷ the high rates at which capital is pouring in today is unprecedented in the history of mankind. Most surprising is the fact that it is ‘no longer the real economy driving the financial markets, but the financial markets driving the economy.’¹⁸ The large-scale flow of commodities, capital, technology and labour, all facilitated through developments in the international finance, increasing liberalization of markets and the revolution in communication technology, leading to the integration of world market and international division of labour distinguishes the free flow of capital of Yesteryears from what has been going on in the name of globalization for decades. While the end of the cold war and collapse of socialist alternative, the ideological hegemony of new-liberalism and supply side fiscal policies, the dynamics of international competitiveness and revolutions in the field of technology, especially in information technology have induced and accelerated the process of globalization, the international economic institutions (IMF and World Bank) and multinational corporations, which are economically more powerful than many developing countries, have subsidized, supported and reinforced the process of globalization so much so that developing countries where more than three billion people live have also moved from the inward looking state induced development model to the market-oriented free economy model to achieve rapid economic growth and have opened their formerly closed markets. Apart from the disenchantment of these countries with the old state-centred and protectionist system¹⁹ and the pressure exerted on them by financial and economic interest groups to pursue the path of deregulation, liberalization, and privatization which together constitute globalization, the hope that it will benefit all human beings led the adoption of IMF/World Banks’ suggested economic reforms by our governments, of course with different forms, speeds and sequences.

The main agents of globalization-IMF, World Bank, WTO, TNCs and Banks and investment firms have been successful in spreading the message across the globe that globalization offers a host of opportunities for optimum utilization of resources, availability of capital and finance, maximization of consumer welfare and acquiring knowledge and technology for economic development. Globalization, according to its supporters, enhances economic growth through expanded markets for goods, services and capital. Citing the empirical evidence that

¹⁶Stark, *supra* note 1, at 509.

¹⁷See, Paul Hirst and Graham Thompson, *Globalization in Question* (1996).

¹⁸Observation of a fund manager in Hongkong, cited in Stark, *supra* note 1, at 511.

¹⁹The World Development Report 2000/2001, *Attacking Poverty*, at 61, available at: http://wdronline.worldbank.org/worldbank/a/c.html/world_development_report_2000_2001/abstract/WB.0-1952-1129-4.abstract. [accessed on December 1, 2013].

shows positive relationship between economic growth and openness it has been argued that a country can grow fast through opening its international trade.

The emphasis of globalization-induced market-oriented reforms has been on competitiveness, foreign investment, capital-intensive high technology production, privatization and disinvestment of public sectors. Neo-liberal economic reforms of which globalization is a tool, require that state should not politically manage economy and guarantee social welfare but should provide infrastructure for the economic growth. According to supporters of reforms competition, efficiency, excellence and quality as against subsidy, inefficiency, protectionism and mediocrity should be pursued with full vigour if the benefits of globalization are to be reaped. With the gradual adoption of these market-oriented policies, countries like India have entered into a life of paradoxes and contradictions. Although many countries still sing the tune of welfarism, these policies corrode the authority and role of the state by throwing up the problems of opposed foundational dualities-community versus individual identities, efficiency versus welfare, and state versus market.

(b) *Globalization of Culture*

The process of globalization occurring in economy and society has dramatically impacted other sectors of human life. It is more pronounced in the field of culture. Explaining how globalization of markets and capital has fueled the globalization of culture, Barbara Stark observes,²⁰ ‘It is not just Dollars that are flowing freely around the world but Western Culture, Constitutionalism and Coca Cola, free market ideology and Bruce Willis. Every State has had a taste of relentless, technology-enhanced consumerism, free market democracy promoted by advertising so creative, so well done, that no culture is impenetrable. It seeps in everywhere. In even the poorest states, wealthy elite import Western luxuries’. Anderson Huyssen also noted nearly three decades ago that ‘twentieth century had ‘reunified’ economy and culture by subsuming the culture under the economics, by reorganizing the body of cultural meanings and symbolic signification to fit the logic of the commodity’.²¹ According to him ‘especially with the help of the new technological media of reproduction and dissemination monopoly capitalism has succeeded in swallowing up all forms of popular cultures, in homogenizing all among local or regional discourses, and in stifling by co-option any emerging resistance to the rule of the commodity’.²²

This process, it is important to remember, has been promoted politically by free market democracy, and legally by such instruments as the International Covenant on Civil and Political Rights (ICCPR) and the US Constitution.²³ States that try to

²⁰Stark, *supra* note 1 at 515.

²¹Andreas Huyssen, *After the Great Divide: Modernism, Mass Culture, Post Modernism* (1986), at 21.

²²Ibid.

²³Stark, *supra* note 1, at 515.

protect their people from this kind of Western (American) cultural onslaught are accused for denying freedom of free speech and expression.²⁴ It has been further reinforced by the Market branding and mass productions of image from American Soap Operas to McDonald's in industrialized world.²⁵ Thus, Westernization of culture in the developing countries is a 'from the above phenomenon'. To quote Huyssen, 'modern mass culture is administered and imposed from the above and that the threat it represents resides not in the masses but in those who run industry'.²⁶

Thomas Friedman explains how globalization undermines local culture by using the 'Lexus and the Olive tree metaphor'. His thesis is that globalization is inevitable because everyone wants a Lexus (a new fast, Western, expensive car and all the mundane comforts of Western influences).²⁷ According to him some Olive trees (symbol of ancient-loyalties, rootedness, tradition and sustenance) will have to be cut-down to move roads, but perhaps some can be spared.²⁸ Those who will not be able to keep up with the pace set by a high-tech, knowledge-based consumer society whom he patronizingly calls 'turtles'²⁹ must be assured a safety-net.³⁰

The impact of globalization on culture can also be explained by Gracia Clark's³¹ metaphor of the 'International Continental Hotel'. Barbara Stark notes, 'if capital flows to a new region, representatives from this international society- a new international society consisting of those who direct the global capital flows must follow to inspect the site and to meet the local players.' They require 'veritable army of International support workers to make them comfortable'.³² To cater this need has emerged a chain of 'International Continental Hotels' in which women serve a vital role.³³ Arundhati Roy's account of how the purchase of the History House in Kerala by an international hotel chain robbed the people of their history,

²⁴*Id.*, pp.515-16.

²⁵*Ibid.*

²⁶Huyssen, *supra* note 21, at 48.

²⁷Thomas L. Friedman, *The Lexus and the Olive Tree* (1999), pp. 285-94.

²⁸*Id.*, at 376.

²⁹*Id.*, at 273.

³⁰*Id.*, at 354.

³¹Gracia Clark, "Implications of Global Polarization for Feminist Work", 4 *Indiana Journal of Global Studies*, 1996, at 44, cited in Stark, *supra* note 1, at 518.

³²Stark, *supra* note 1, at 518.

³³Gracia Clark notes: "By carefully replicating the culture an infrastructure of the International Hotel Worldwide, these support workers make it possible for the globetrotting executive to belief himself a culturally neutral technocrat. Would be elite candidates can not in fact de contextualize themselves, but must rely on the skill and invisibility of these unacknowledged others to accomplish it for them. Cleaners, personal secretaries, security guards, repairers and deliverers meticulously remove and absorb all traces of the actual physical and cultural location, which can mean solving quite different concrete problems depending on local circumstances". Clark cited in Stark *supra* note 1.

particularly a history of pain and oppression³⁴ also vividly portrays the impact of globalization on the local culture.

The free-market economy-led globalization of culture has many consequences, the foremost one is the homogenization of the world wherein ‘instead of difference among territorial units which were mutually exclusive, there is now uniformity’.³⁵ It has manifested in what is called ‘McDonaldization’ of the world on the one hand and what Lipschutz has called ‘a growing element of global consciousness in the way members of global society act’³⁶ on the other. But this globalization-induced unity is a ‘paradoxical unity, a unity of disunity, it pours us all into a maelstrom of perpetual disintegration and renewal of struggle and contradiction of ambiguity and anguish’.³⁷

It is not that globalization of culture has been without any protest. In fact, there are growing numbers of backlashes against the negative impact of globalization not only from Muslim fundamentalists or critics of globalization of the developing countries, especially those who are facing marginalization, enormous pain and suffering on account of global integration of national economy, but also from a section of the people of the industrialized world. Ever since demonstrators virtually wrecked the WTO meeting in Seattle in 1999, every major conference of the World Bank, the WTO or the G-8 has had to contend with street demonstrations. These anti-globalization demonstrations according to Mr. Jeremy Rifkin are ‘the first stirrings of a cultural backlash to globalization whose effects are likely to be as significant and far-reaching as were the revolutionary movements for political democracy and market capitalism at the end of the eighteenth century’.³⁸ These demonstrations reveal the anger and disillusionment of increasing number of people in the West. Surprisingly, anti-globalization organizations involved in the street battles are not only attacking globalization but they have specific, constructive demands: introduction of the Tobin Tax, cancellation of Third World debt, an open and transparent environment for investment, intensification of the fight against financial piracy and tax havens and removal of European Union Trade barriers against the least developed countries.³⁹ An apt example of a new ‘civil society politics’ as this movement is, has arisen from alienation caused by aggressive trading products and outsourcing production outside national borders which have replaced the manufacturing process in the industrialized world and slashed the job opportunities there.

³⁴Arundhati Roy, *The God of Small Things* (1998), cited in Stark, *supra* note 1, at 519.

³⁵Mlinar, “Individuation and Globalization: The Transformation of Territories Social Organization” in *Globalization and Territorial Identities* (Mlinar ed., 1992) at 21.

³⁶Ronnie Lipschutz, “Reconstructing World Politics: The Emergence of Global Civil Society”, 21 *Millennium Journal of International Studies*, 1992, at 399.

³⁷Marshal Berman, *All that is Solid Melts Into Air: The Experience of Modernity* (1982), at 15.

³⁸Quoted in Kalpana Sharma ‘Fulelling Their Ire’ *The Hindu Sunday Magazine*, 5 August 2001, at 5.

³⁹Ibid.

(c) ***Financial Globalization***

Much of what has been said above about economic globalization is also applicable in financial globalization. But since financial globalization is under more attack than any other form of globalization, some preliminary observations about it need to be made here. Although financial globalization in the sense of the integration of countries with the global financial systems is not a new phenomenon and can be traced to the gold standard period of 1880–1914 when ‘cross-flows surged, incorporating countries in the center and the periphery at that time into a worldwide network of finance and investment’. ⁴⁰ Yet it was not until the late 1970s that the new wave of financial globalization began to take place. This new pattern of financial globalization was marked by the dismantling of capital controls, the deregulation of domestic financial systems and technological revolution in information telecommunication and financial product engineering.⁴¹ This wave of financial globalization engulfed within its sweep the newly emerging markets in the late 1980s but mostly in the 1990s.

Financial globalization has assumed various forms such as international capital raising, international cross-listings, trade finance, foreign bank participation and foreign debt issuance. Forces behind the process of financial globalization include support extended to it by its agents such as international banks, mutual funds and other institutional investors. In addition to liberalization and technology, trade finance has been instrumental in accelerating the process of financial globalization.

The United States and the United Kingdom backed and promoted the process of financial globalization with the sole aim of re-capturing leadership of the world economy. For this purpose, the United States adopted a slew of legislative measures through which it in effect eased the regulation of the commercial banking by the FRG and allowed these banks to engage in speculative dealings which subsequently proved highly risky in the global financial markets. Various kinds of security paper were worked out by the new financial institutions like hedge funds and private equity funds. The subprime loan crisis that erupted in September 2008 in the United States was the result of the multi-layered securities which were approved by rating agencies as safe.

There is much debate among economists on the effects of financial globalization, while for its supporters its advantages include improvement in domestic financial sector and transfer of technology and skills through foreign direct investment, and collateral benefits such as development of domestic financial markets, improvements in institutional governance, and discipline on macroeconomic policies,

⁴⁰T. Beck, S. Claessens, S.L. Schmukler, “Financial Globalization and Crises: Overview”, available at: <http://siteresources.worldbank.org/DEC/Resources/FinancialGlobalizationandCrisisOverview.pdf>. [accessed on November 29, 2013].

⁴¹Ibid.

according to Justice Bhagwati⁴² and Stiglitz,⁴³ financial globalization can cause severe crisis, and more generally, increase risks. Fischer⁴⁴ and Summers,⁴⁵ however, argue that the gains of the financial globalization far outweigh the risks.

2.3 Symbiotic Relationship Between ‘Globalization from Above’ and ‘Globalization from Below’

Globalization from above has inadvertently nurtured transnational social forces concerned with environmental protection, human rights, peace and human society. Transnational society created by globalization ‘consists of groups, individuals and institutions which are independent of the state and of state boundaries, but which are, at the same time, preoccupied with public affairs.’⁴⁶ In the words of Richard Price transnational society means ‘a set of interactions among an imagined community to shape collective life that is not confined to territorial and institutional spaces of states’.⁴⁷ It refers to the ‘thin and uneven public sphere that can coalesce at the global level where individuals interact for common purposes and shape collective life’.⁴⁸ Civil society, however, does not include groups which advocate violence, self-organized groups which campaign for exclusivist communitarian concepts or self-interested private associations like those of criminals.⁴⁹ A shared commitment to common human values or what Dunne and Wheeler have called the ‘notion of a human rights culture’⁵⁰ distinguishes the components of the

⁴²Bhagwati, J., “The Capital Myth: The Difference between Trade in Widgets and Dollars”, 77(3) *Foreign Affairs*, 1998, pp. 712, available at: <http://web.cenet.org.cn/upfile/57122.pdf>. [accessed on December 1, 2013].

⁴³Stiglitz, J., *Globalization and Discontent* (W.W. Norton, New York, 2002).

⁴⁴Summers, L., “International Financial Crises: Causes, Prevention and Cures”, 90(2) *American Economic Review*, 2002, pp. 1–16.

⁴⁵Fischer, S. “Capital Account Liberalization and the Role of the IMF”, *Essays in International Finance*, 1998, pp. 1–10, available at: http://www.princeton.edu/~ies/IES_Essays/E207.pdf. [accessed on December 1, 2013].

⁴⁶Mary Kaldor, *supra* note 1, at 210 See generally, Anne-MaireSlaugather, “International Law and International Relations Theory: A New Generation of Inter-disciplinary Scholarship”, 92 *AJIL*, 1998, at 368; Kingsbury, “Indigenous Peoples in International Law: A Constructionist Approach to the Asian Controversy”, 92 *AJIL*, 1998, at 414; Timothy P. Teffell and Bernard McNamee, “Trans-Sovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice”, 17 *Fordham International Law Journal*, 1994, at 459.

⁴⁷Richard Price, “Reversing the Gun Sights: Transactional Civil Society Targets Land Mines”, 52 *Int. Org.*, 1998, pp. 15, 618.

⁴⁸*Id.*, at 627.

⁴⁹Mary Kaldor, *supra* note 1, at 210.

⁵⁰Tim Dunne and Wheeler, “Introduction” in Dunne and Wheeler (eds) *Human Rights in Global Politics* (1999).

transnational level society from other organizations.⁵¹ As Leon Gordenker and Thomas Weiss note, ‘Electronic means have literally made it possible to ignore borders and to create the kinds of communities based on common values and objectives that were once almost the exclusive prerogatives of nationalism. The increasing growth of international, regional and even local networks with similar human rights concerns and their participation in the human rights decision-making process have made global campaign possible outside the framework of inter-state meetings. The increasing role played by these networks and non-state actors in the realm of international relations while presenting a serious challenge to state centric world politics provides greater opportunity for the protection and promotion of human rights’.

Globalization is not only an ‘out there’ phenomenon, it is also an ‘in here phenomenon’, affecting even intimacies of personal identity.⁵² As Giddens note, ‘To live in a world where the image of Nelson Mandela is more familiar than the face of one’s next door neighbour is to move in quite different contexts of social action from those that prevailed previously’.⁵³ Bengoa also explains the complex relationship between ‘down here’ and ‘bottom up’ globalizations as follows:⁵⁴

The ‘globalization of standards’ is the most important consequence of ‘bottom up’ globalization. Local communities as well as being subject to the impacts of international trade are also fueling the impacts of new concepts of justice and equality that are intercommunicated throughout the world. This means that old ways of life that were bearable in isolation and in ignorance of alternatives are beginning to be called into question locally.

3 Effects and Consequences of Globalization

3.1 The Erosion of the Nation-State

⁵⁵One direct consequence of globalization is the diminishing power of the state and its capacity to deal with the economic matters and to some extent also political

⁵¹Mary Kaldor, *supra* note 1, at 210.

⁵²Giddens, “Affluence, Poverty and the Idea of a Post Scarcity Society”, 27 *Development and Change*, 1996, pp. 365–378, quoted in Andrew Clapham “Globalization and the Rule of Law”, 61 *ICJ Rev.*, 1999, at 1.

⁵³Ibid.

⁵⁴Bengoa, J., *Final Report, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Relationship between the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights, and Income Distribution*, E/CN.4/Sub.2/1997/9, 1997, at 23.

⁵⁵The literature which examines the effects of globalization is enormous. For the readers who are interested to find where the discussions stand at the present on the various issues, a representative sample of solid sources, to begin with, would include: Milanovic B., *Worlds Apart: Measuring International and Global Inequality* (Princeton University Press, 2005) and “The Real Winners

matters challenging the existing notions of territory, sovereignty and nation.⁵⁶ For reasons outlined above, the State is no longer the only centre point of innovative action and human activities and the decision-making process at the global level is no longer monopoly of the states as was the case in the twentieth century⁵⁷ because the state is now operating within an increasingly diverse matrix of transnational interactions involving other states, inter-governmental institutions, corporations, and whole range of cross-border groups and networks.⁵⁸ Ken Booth sees in this development a beginning of disintegration of sovereignty. ‘Sovereignty is disintegrating, states are less able to perform their traditional functions. Global factors increasingly impinge on all decisions made by governments. Identity patterns are becoming more complex as people assert their local loyalties but want to share in global values and life styles... (the metaphor for the) international system which is now developing... is of an egg box containing the shells of sovereignty; but alongside it a global community omelet is cooking’.⁵⁹

Although the global omelet exists, whether globalization would eventually lead to a demise of nation-state in future is uncertain because the state is still active in norms formation and pursuit of inter-state activities and only the shape, direction, nature and scope of inter-state actions are changing. But it is perhaps safe to predict that their tasks, power and purpose will be eroded. In the words of Sergio Ortino, ‘They will provide certain services, but will no longer pretend to solve all the problems of a people in a particular territory as has been the case in the twentieth century’.⁶⁰

These changes continue to affect in a profound manner the shape and character of the global politics. It is important to note that in the past, world politics was

(Footnote 55 continued)

and Losers of Globalization”, *The Globalist*, 2012; Hurrel, A. Woods. N, “Globalization and Inequality”, in R. Higgott, (ed.), *The New Political Economy of Globalization*, (Cheltenham, UK, 2000); Goldsmith, E. “Global Trade and the Environment”, in J. Mander and E. Goldsmith, (eds.), *The Case Against the Global Economy* (Sierr, San Francisco, CA, 1996); Najam, A., Runnalls, D., Halle, M., *Environment and Globalization- Five Propositions* (Winnipeg, Manitoba, Canada: International Institute for Sustainable Development, 2007); Tomlinson, J., *Globalization and Culture* (Chicago University of Chicago Press, 1999); Singer, P., *One World: The Ethics of Globalization-New Haven* (Yale University Press, 2nd ed., 2004).

⁵⁶See generally, Christoph Schreuer, “The Waning of the Sovereign State: Towards a New Paradigm for International Law”, 4 *European Journal of International Law*, 1993, pp. 447–471; Jean Marie Guehenno, *The End of the Nation State*, (1995); “Symposium on the Decline of the Nation State”, *Cardozo Law Review*, 1996, at 187; Kenike Ohme, *The End of the Nation State, The Rise of Regional Economic* (1995); W.H. Reinicke, *Global Public Policy Governing without Government* (1998) at 31.

⁵⁷Sergio Ortino, “Minority Protection under International Law-Evolution or New Perspective?”, 29 *The Banaras Law Journal*, 2000, at 18.

⁵⁸Julie Mertus, “The Promise of Transnational from Legal Transplants to Transformative Justice Civil Society”, 14 *American University International Law Review*, 1999, at 1347.

⁵⁹Ken Booth, “Security in Anarchy: Utopian Realism in Theory and Practice”, 67 *Int. Affairs*, 1991, at 542.

⁶⁰Sergio Ortino, *supra* note 57.

structured on relations between states but the new world politics of modern times is, according to global theorists, constituted not just by states but also by an increasingly global society, and by its economic and cultural dynamics.⁶¹ Changes of state power caused by the globalization process are ‘very much constitutive as well as constituted Global state structures that are being formed are both cause and effect of global societal developments’.⁶² Therefore, the concept of global society should be seen not merely in relation to nation-states but in the context of ‘the emergent, contradictory global state’.⁶³ While international theorists see crises in world politics primarily as inter-state crisis, global theorists want us to see them as global crises/which are structured by the interactions of state and society and constituted by media and other institutions in civil society as well as state, whereas state system perspective prioritizes the voices of state leaders leaving the voices of individuals and social groups secondary and marginal, global theory looks at institutions of state and civil society in terms of their ability to secure better representation of peoples voices in the international arena. Finally, the global society which is coming into existence as a result of globalization is also gaining new institutions.⁶⁴ Globalization has also thrown up or given content to the concepts of ‘global governance’,⁶⁵ and ‘international justice’.⁶⁶

This altered course of world politics is bound to impinge on the Westphalian model of state system on which international law is founded. While there may be some truth in the assertions of some commentators that in terms of spreading the good life, Westphalia is another of the West’s failure, the fact that this framework of world order has been able to enable the states to cope with new challenges and crises in the ups and down of history through a continuous process of re-orientation and adaptation of international political life, cannot be denied.⁶⁷ There is no denying that in the past when new concerns and challenges emerged on the international scene, the intrinsic resilience and inherent flexibility of the model enabled states to cope with them through appropriate normative and institutional responses without compromising their dominant status as typified subjects of international Law. Now when some functions, which were used to be carried out through inter-state cooperative efforts have been taken over by global, regional privatized actors that are difficult to hold under traditional international procedures, international law cannot remain unaffected by these dramatic developments. Apart from the employment of mercenaries and private armies by the governments, of

⁶¹Martin Shaw, “Global Voices: Civil Society and the Media in Global Crises”, in Dunne and Wheeler (eds.), *supra* note 8.

⁶²*Id.*, at 230.

⁶³*Ibid.*

⁶⁴*Id.*, at 227.

⁶⁵For details see Good Governance Agenda, *infra*.

⁶⁶See generally, Baogang, “The Four Notions of International Justice”, 29 *The Banaras Law Journal*, 2000, pp. 34–50.

⁶⁷Richard Flak, “The Challenge of Genocide and Genocidal Politics in an Era of Globalization”, in Dunne and Wheeler, *supra* note 8, at 178.

Sierra Leone and Papua New Guinea to keep peace, determination of the asylum law in the closed meetings of the Ministers of the European Union⁶⁸ and the ability of private organizations to keep personal data of people in such a way as to elude national or international legislation, the fact that the UN does not have, at this point in history the institutional capacity to conduct military enforcement measures under Chap. 7 and ad hoc coalitions of willing Member states are now seen as the most effective deterrent to aggression or to the escalation or spread of an ongoing conflict⁶⁹ clearly underline the urgency of making certain powerful transnational actors accountable. That WTO, rather than the UN is now seen as the fulcrum of international interaction also reflects the foundational shift of international relations.

3.2 Fragmentation of Nation-States

Another fallout of globalization is the fragmentation of states and peoples into autonomous group and areas and the consequent formation of economic, social and cultural associational formations around identity markers like language, culture, kinship both as a survival tactic and means of protection of the collective interests in the increasingly globalized world, posing serious challenges to the territorial integrity of states and threatening the human rights of other identity groups.⁷⁰ The alienation of the deprived, neglected and all those who fail to keep up with the pace set by a high-tech knowledge-based society as a result of governments' liberalization policies may also fuel the rise of ethno-national or reactive nationalism. If the past experiences are any guide when tensions between identity groups are manipulated by local power brokers, they may escalate into intra-state conflicts, raising a series of human rights concerns.

⁶⁸Clapham, *supra* note 52, pp. 2–3.

⁶⁹The New Protocol on Asylum for Nationals of Member States of the European Union provides: Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Nevertheless, the Protocol has been criticized by UNHCR: The EU decision is a matter of concern. If the EU applies limitations in the Convention, others can follow and could weaken the universality of the instrument for the international protection of Refugees. It is therefore difficult to share the position taken in the preamble stating that the Protocol respects the Convention.

⁷⁰See generally, Sol Picciotte, "Networks in International Economic Integration Fragmented States and the Dilemmas of Neo-Liberalism", 17 *New York Journal of International Law and Business*, 1996–1997, at 1014.

3.3 Good Governance Agenda

Good governance agenda pushed out by international lending agencies like World Bank in the wake of globalization process demands that the state withdraw from some of the responsibilities undertaken in response to social democratic and welfare objectives. Staunch supporters of this agenda maintain that good governance is a necessary condition for attracting capital and maintaining stable growth. The state, the argument runs, should not attempt politically to manage economy and society and guarantee welfare but should remain the primary provider of social goods and also provide adequate material infrastructure to attract capital and promote economic growth.⁷¹ Its advocates call for the incorporation of some of the values and techniques of management-profitability, cost benefit analysis and economic rationality into public administration. The good governance project is essentially executive-led and political accountability is limited.

Before proceeding to identify the salient features of good governance and their implications for the state and society, the distinction between government and governance needs to be recognized. While government ‘suggests activities that are backed by formal authority, by police powers to ensure the implementation of duly constituted policies’, governance ‘refers to activities backed by shared goals that may or may not derive from legal and finally prescribed responsibilities and that do not necessarily, depend on police powers to overcome defiance and attain compliance’.⁷² Governance, according to this construct, ‘embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby those persons and organizations within its purview move ahead, satisfy their needs, and fulfill their want’.⁷³

Turning to good governance, ‘democratic governance’,⁷⁴ is seen by some as an apt description of good governance. While democratic governance may incorporate goods governance practices, the concept of good governance is wider than democratic governance.⁷⁵

While participatory decision-making process along with other core elements of democracy are integral components of good governance agenda, the markers of good governance suggested by the World Bank are no less important. According to

⁷¹Sarah Joseph, ‘Good Governance Agenda’, *the Hindu Open Page*, July 31, 2001.

⁷²James Rosenau, “Governance, Order and Change in World Politics”, in Rosenau and Zempel (eds.) *Governance Without Government: Order and Change in World Politics*, (1992), pp. 1, 4.

⁷³Ibid.

⁷⁴See generally Michael E. Brown et al. (eds.), *Debating the Democratic Peace* (1996).

⁷⁵On the meaning, definition and characteristics of good governance, see, B.C. Nirmal, “Sovereignty in International Law”, *Soochow Law Journal*, 2006; see also, B.C. Nirmal, “Good Governance and Human Rights as Democratic Values”, *Indian Journal of Federal Studies*, 2009, pp. 377–407.

the World Bank good governance is epitomized by the following⁷⁶: (a) predictable, open and enlightened policy making, (b) a bureaucracy imbued with a professional ethos acting in furtherance of the public good, (c) the rule of law, (d) transparent process and (e) a strong civil society participating in public affairs. Bad governance, on the other hand, has following characteristics: (a) arbitrary policy making, (b) unaccountable bureaucracies, (c) unenforced or unjust legal systems, (d) the abuse of executive power, (e) a civil society unengaged in public life and (f) widespread corruption.

Achieving good governance necessitates informal political system, political accountability, just and effective legal system, bureaucratic accountability, freedom of information, cooperation between the state and the transnational society. Good governance also requires technology up gradation, incorporating wherever possible principles and techniques of management into public administration, de-bureaucratization, decentralization, downsizing of the government, anticipation of crisis in society, training of civil servants and their capacity building.

Needless to say, good governance agenda throws open many new ideas and methodologies which need to be discussed in India and elsewhere. As market-oriented good governance agenda has potentiality to hurt the World's poor in many ways, there is an urgent need to reinvent governance around the human rights, human dignity and human well-being of all people.

3.4 Challenges of Globalization for the International Rule of Law

Challenges posed by globalization for the rule of law require not only a re-definition of the concept but also the development of new strategies and programmes to extend the reach of international rule of law to the principal agents of globalization. To put it more specifically, concerted efforts are required to ensure that principles of the rule of law such as judicially enforceable respect for human rights, accountable decision making and participation in the production of legal solutions of human rights problems are applicable to the major agents of globalization.⁷⁷ As the matter stands now, the international organizations, the IMF, the World Bank and the WTO are not directly subject to human rights law because they are not states. Although those institutions were originally created by member states and still remain dependent on states, they have become so powerful that they now impose conditionalities, trade regulations and dictate market reforms including

⁷⁶World Bank, *Governance: The World Bank's Experience*, (Operations Policy Department, Final Draft, Nov. 23, 1993). Cited in Patricia Armstrong, "Human Rights and Multilateral Development Banks: Governance Concerns in Decision Making", 88 *ASIL Proc*, 1994, at 280.

⁷⁷Andrew Clapham, *supra* note 52, at 31.

structural adjustment programmes on the loan receiving states.⁷⁸ No wonder then, these very institutions may bypass or ignore social and economic rights as they go about establishing trade relations and setting the conditions for the loan.

Transnational Corporations (TNCs) are presently the central organizers of the world economy. Although they are nominally subject to the municipal law of the host country, TNC's transnational character, their international mobility, inequalities in bargaining power between TNCs and developing host countries and their ability to buy the kind of law they like render the municipal legal controls virtually ineffective. National laws, particularly labour laws and human rights law, which are most relevant in this context are generally not enforceable extraterritorially as these enterprises are capable to avoid the impact of these laws by moving abroad. A home country may certainly extend the application of such laws extraterritorially but its impact is limited in view of the best-established principles of international jurisdiction.⁷⁹ A host country is hardly in a position to control a TNC because, 'a unilateral effort to control the TNC can be frustrated by the TNC's ability to shift its resources to another, more hospitable country. Even regional efforts can result in the flight of foreign capital rather than its regulation'.⁸⁰ Today, when most of the third world countries are competing with one another to attract foreign capital and for this purpose have gone or willing to go to extraordinary lengths, it will be naive to expect them to impose effective control on the TNCs.⁸¹

International law has only taken cognizance of the TNC in an 'oblique fashion'.⁸² There is no denying that given the political willingness of nations to deal with the problem on a united basis, international law can respond to it effectively, but as the matter stands now this law has precious little theory and concept to address this problem.

As has been discussed in some detail by this author elsewhere, the need of the hour is to make these entities understand that they too have responsibilities under human right law.⁸³ To this end, international law needs new theory, mechanisms or procedures. The problem for civil society organizations, governments and the MNCs is how to rethink the obligations of corporations as organs of society and transform some of them 'into dedicated servants of the common good'.⁸⁴ Actions are also needed to secure the adherence of ethical investment practices and the adoption of labour codes by TNCs.

⁷⁸Stark, *supra* note 1, at 537.

⁷⁹See Stark, *supra* note 1, at 538; See also Vagts, "The Multinational Enterprise: A New Challenge for Transnational Law", 83 *Harv. L. Rev.*, 1970, at 739.

⁸⁰Stephen Coonard, "The United Nations Code of Conduct for Transnational Corporations", 83 *Harv. L. Rev.*, 1970, at 739.

⁸¹Stark, *supra* note 1, at 539.

⁸²Coonard, *supra* note 80, at 277.

⁸³B.C. Nirmal, "The Eradication of Poverty in the Era of Globalization: A Human Rights Perspective", 48 *IJIL*, 2008, pp. 587–613.

⁸⁴Crossman and Adams, "Exercising Power Over Corporations Through State Charters", in Mander and Goldsmith (eds.) *The Case Against the Global Economy*, at 389.

Banks and investors rely on Standards and Poor's and Moody but such services react rather than predict performance. For investment firms, human rights are legally irrelevant. Accordingly, the issue for civil society organizations and governments is how to make the foreign investment firms responsive to human rights concerns. Meanwhile, jointly with governments and the private sector, the international financial institutions must strengthen the international financial architecture and improve its management to lessen economic volatility, which can be devastating for poor people.⁸⁵ Actions are also needed to deal with corruption as a part of the fight for human rights in view of the obvious linkage of corruption to the enjoyment of economic, social and cultural rights. Corruption and impunity for perpetrators of this menace exist side by side with the quest for good governance and the enjoyment of economic, social and cultural rights.

Multinational corporations that indulge in corrupt practices abroad justify their actions saying that they are necessary for doing business abroad. For this reason, the adoption of regional and international conventions against corruption should be seen as an important normative development.⁸⁶ In devising such conventions attention should also be focussed on the fraudulent enrichment of the public officials and their impunity.⁸⁷

3.5 Effects of Globalization on the Developing Countries

Trade can provide a powerful engine of economic growth and globalization may expand international trade opportunities. But as is evident from the relevant data, the developed countries have benefited more from the opportunities of the global economy than the developing countries.⁸⁸ In general, developing countries have not benefited much from globalization because of the protectionist policies of the developed countries. Thus, for manufactured goods including food products, which now account for almost three-quarters of developing country exports, tariffs imposed by the industrialized world are, on average, four times those facing industrial country exports to the same market.⁸⁹ As a World Bank Report notes, 'High-income country's tariffs are not, only higher for manufacturers from developing countries, they also escalate with the level of processing'.⁹⁰ The most blatant is the imposition of high tariffs on those products in which developing

⁸⁵See B.C. Nirmal, *supra* note 83.

⁸⁶In accordance with article 68(1) of resolution 58/4, the United Nations Convention against Corruption entered into force on December 14, 2005, available at: <http://www.unodc.org/unodc/en/treaties/CAC/>. [accessed on November 29, 2013].

⁸⁷The United Nations Convention against Corruption, 2005, Article 20.

⁸⁸For the increasing gap between 'Haves' and 'Have Nots' see U.N. Development Programme Human Development Report, 1994, pp. 16–27.

⁸⁹World Development Report, *supra* note 19, at 180.

⁹⁰Ibid.

countries like India have a competitive advantage. For instance, the unfair tariff and non-tariff barriers that India is facing in steel, textiles, clothing and leather products. Expanding access to rich country markets for developing countries' agricultural goods can certainly do much to help poor countries grow faster and to reduce poverty in the developing world but here again their products are facing not only high tariffs and non-trade barriers but also huge subsidies that the developed countries, particularly the EU are giving to their own farmers. That these barriers present a serious setback to development efforts in poor countries is evident from the fact that agricultural tariffs and other distortions cause annual welfare losses of 19.8 billion for developing countries, equivalent to about 40% of the Official Development Assistance given to developing countries in 1998.⁹¹

While the developed countries are reluctant to open their markets for products of developing countries, they are forcefully demanding the inclusion of non-trade issues such as labour and environmental standards which might furnish scope for misuse as non-tariff barriers. They also have a grouse that many of the restrictions on foreign investment or on patents substantially persist in many developing countries. Surely, the intellectual property regime embodied in Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs) is necessary for encouraging innovation and protecting the interests of creators of knowledge but the fact remains that intellectual property rights can sometimes prevent the distribution of potential international public goods helpful to poor countries, which can seldom afford the prices charged by patent owners⁹² should also be taken into consideration in any international discourse on this issue. It should be recognized that developing countries have a duty to ensure availability and affordability of the latest medicines for life-threatening diseases. The TRIPs agreement should, therefore, enable every member country to take a broad range of measures for protecting and promoting health care.⁹³ For developing countries, three trends in intellectual property rights are matters of serious concern—(i) near monopoly of private companies in basic research and knowledge generation, (ii) vast majority of patents worldwide by the industrial countries and (iii) patent of the biological and genetic resources and traditional knowledge. The last one has serious implications for poor countries. Thus in some cases, breeders of plant varieties protected by patents can prevent farmers from re-using harvested seed. Surely, a system of intellectual property rights designed to protect industrial machinery should not be extended to such innovations as recombinant DNA techniques, monoclonal antibodies, and new cell and tissue technologies. Apart from the ethical issues that such innovations may involve, the inefficacy of the existing regime and the adverse consequences of such innovations for the farmers and vulnerable sections of the developing world

⁹¹Ibid.

⁹²*Id.*, at 184.

⁹³B.C. Nirmal, "Human Right to Health, Access to Drugs and Global Medical Patents", 49 *IJIL*, 2009, pp. 377–407; B.C. Nirmal, "International Copyrights Law and Developing Countries", in S. N. Saxena (eds.), *Spotlight on Intellectual Copyrights* (2005) pp. 98–113.

underline the need of negotiating a new intellectual property rights regime.⁹⁴ In this context the suggestions of former Indian Prime Minister Mr. A.B. Bajpajee⁹⁵ that it should be mandatory for patent applications to reveal the country of origin of biological and genetic resources and traditional knowledge used in the product or process for which the patent is sought and that a letter of informed consent should also be furnished from their legitimate custodians are thoughtful and deserve serious consideration from the members of WTO.

It is indeed an undisputed fact that most of the agreements and understandings reached during the Uruguay Round Trade negotiations are unequal and unbalanced from the viewpoint of developing countries.⁹⁶ As Mr. Muchkund Dubey, a former Indian Foreign Secretary, observe: the agreements on TRIPs, TRIMs, Agriculture and subsidies have the effect of irretrievably closing for the developing countries macroeconomic policy options which developed countries enjoyed till recently.⁹⁷

Notwithstanding the assertions of the critics of globalization that like the Enlightenment, free market democracy promises utopia but conceals the ‘will to power’ of late capitalism⁹⁸ and also that globalization is nothing but a stratagem, defined by Washington ‘to make the World safe for US and Allied capital’,⁹⁹ countries that have opened their economies and have proper infrastructure and institutional framework have posted a significant increase in their incomes. But side by side globalization also has thrown up the challenges of how to manage the processes and threats unleashed by changes in the parameters of social development in all countries so as to enhance their benefits and reduce their negative effects on human beings. Not only does the distributional benefit of globalization vary from country to country even within a country benefited from it, it has had different effects on different segments of the population. Thus, an increase in GNP of a country may be deceptive¹⁰⁰ and may not necessarily bring about an improvement in the condition of vulnerable sections of society. As globalization is likely to benefit only those people who have skills to be absorbed into new activities, who are geographically mobile and willing to look for work in new occupations and sectors, the unskilled, the immobile and those without access to the new market

⁹⁴*Id.*, at 185.

⁹⁵“India Has Open Mind on Trade Issues”, *The Hindu*, August 21, 2001.

⁹⁶On the inequitable nature of the TRIPS regime see B.C. Nirmal “Human Right to Health, Access to Drugs and Global Medical Patents”, 49 *IJIL*, 2009, pp. 377–407; B.C. Nirmal, “International Copyrights Law and Developing Countries”, in S.N. Saxena (eds.), *Spotlight on Intellectual Copyrights* (2005) pp. 98–113.

⁹⁷RIS (Research and Information System for Developing Countries), Annual Report 2006/07 and Work Programme 2007/ 08, available at: http://www.ris.org.in/images/RIS_images/pdf/RIS-AR-2006-07.pdf. [accessed on November 29, 2013].

⁹⁸Stark, *supra* note 1, at 550.

⁹⁹Pulpore Balkrishnan, “Globalization True and False”, *The Hindu*, August 21, 2001.

¹⁰⁰For a clear explication of the limits of G.N.P, see Martha Nussbaum and Amartya Sen, “Introduction” in the *Quality of Life* (Martha Nussbaum and Amartya Sen (eds.) 1993) at 1.

opportunities are likely to suffer from the ongoing process of globalization¹⁰¹ Trade liberalization can lead to reductions in employment in previously protected sectors, but it may take time for affected workers to develop the skills required to take advantage of growing opportunities in other sectors.¹⁰² That unhindered labour mobility is not part of trade liberalization may be beneficial to American capital but it has serious human rights implications for poor and vulnerable sections of developing countries.¹⁰³ In fact, many people have been excluded from the benefits of globalization. Poverty and unemployment have devastated the population of the third world. Even in the advanced nations deregulation and austerity policies of governments have weakened the social safety-net which is getting further overburdened by those who cannot compete with the powerful.

It is by now clear that market forces by themselves are not sufficient to bring about the desired rate of economic growth. Institutions that ensure that they operate smoothly and that the benefits of reforms reach important people are important as well. Globalization and the worldwide struggle for competition have been detrimental to the interests of the World's 'poor because the profit seeking private sector, particularly the TNCs hardly pay any attention to a range of social objectives.' As aptly observed by the U.N. Secretary General Kofi Annan, 'for too many people in the World today openness looms as a threat.'¹⁰⁴

Globalization not only holds a potentiality to undermine the social and economic rights of the impoverished, deprived and disadvantaged sections of society, it may also thwart the best efforts of the developing countries to maintain and preserve their eco-systems and natural resources. To quote the Special Reporter of the Sub-Commission on the Question of the Realization of Economic, Social and Cultural Rights, 'structural adjustment package policies, which invariably include increasing exports, often result in the overexploitation of natural resources, which counteracts governmental attempts to solve environmental problems, countries trapped in 'debt-crisis' are the worst victims of these policies.'¹⁰⁵ As the World Commission on Environment and Trade aptly noted: 'Debts that they cannot pay force African nation relying on commodity sales to overuse their fragile soils, thus turning good land into desert'.¹⁰⁶ The effect of debt-crisis on the environment in Latin America is not different from one in Africa. This approach to the debt problem is shortsighted from several standpoints: economic, political and environmental. It requires relatively poor countries simultaneously to accept growing

¹⁰¹World Bank Report, *Attacking Poverty* (2001), at 66.

¹⁰²Ibid.

¹⁰³See the Copenhagen Declaration and Program of Action of the World Summit for Social Development (6–12 March 1995). Excerpts complied in 36 *IJIL*, 1996, at 104.

¹⁰⁴Mr. Annan said this while addressing a meeting of leading corporate, organized by the Federation of Indian Chambers of Commerce and Industry, *The Hindu*, March 17, 2001.

¹⁰⁵E/CN.4/Sub.2/1991/17, PP36-50, especially paras 124–166.

¹⁰⁶*Our Common Future*, UNEP/GC, 14/13, para 11.

poverty while exporting growing amounts of scarce resources.¹⁰⁷ Needless to say, it is the poorest and weakest sectors on which the growing burden of indebtedness and structural adjustment falls. In this context, the fact that the world economic system takes from a poor country more than it gives to it, must be recognized. To deal with the debt-crisis which has a clear human rights and environmental implications global mobilization of support for a new innovative and imaginative scheme of debt relief is required.^{,108}

For making aid more effective in reducing poverty the World Bank has suggested that aid delivery framework should focus on ownership and partnership, less intrusive aid delivery mechanisms and selectivity.¹⁰⁹ But each component of this framework brings in great implementation challenges. Practical steps are, therefore, required to cope with these difficulties and make this framework workable in the right earnest.

Globalization may be helpful in accelerating poverty reduction and narrowing the huge gaps in income, health and other dimensions between rich countries and poor. To this end, the industrialized countries in cooperation with private sectors must expand market access for developing countries' goods and services, reduce the risk of economic crises and encourage the production of international public goods that benefit poor people. Ensuring a voice for poor people in global forum is also necessary in order to make them responsive to the needs of poor people. Innovative solutions are also needed to strengthen the capacity of poor countries to represent their interests in global forums and build global networks of poor people organizations. Strengthening global networks of poor people's organizations like Home Net will fortify a much-needed voice in international cooperation: the voice of the poor themselves. Just as for national policies, their voice is essential in ensuring that global policies meet their needs.¹¹⁰

Studies show how WTO led globalization continues to undermine the economic and social rights of the individuals living in the developing countries. The recent controversy over the compatibility of the Indian Food Security Act with the Agreement on Agriculture once again explicates the adverse impact of globalization on the sovereign policy domain of States to conceive and implement policies aimed at the realization of human rights. It also shows the insensitiveness of the industrialized countries to accommodate the legitimate concerns of the developing countries. As is well known, agriculture was the core issue at Doha but instead of taking meaningful steps towards revival of Doha, developed countries, the advanced countries are pushing their agenda through a combination of unilateral and multilateral agreements.

¹⁰⁷*Id.*, para 20.

¹⁰⁸The Vienna Declaration and Program of Action calls upon the International Community to make all efforts to help alleviate the external debt burden of developing countries, in order to supplement the efforts of the government of such countries to attain the full realization of economic, social and cultural rights of their people. For the text see 33 *IJIL*, 1993, at 133.

¹⁰⁹The World Development Report, *supra* note 19, pp. 190–200.

¹¹⁰*Id.*, at 187.

The United States has recently rejected the G33 proposal tabled by Indonesia, India and China for either revising the methodology or updating the external reference price of grains; which is at the heart of a flawed 1994 Agriculture Agreement that would limit the food subsidy India can provide. India therefore had apprehension that its new National Food Security Act will be brought to scrutiny by the disputes settlement body (DBS). The best India expected from Bali was a 2-year reprieve.¹¹¹ On the other hand, the United States tried its best to get an expansive trade facilitation inked at Bali against the interests of the developing countries. However, it is important to note that at Bali, Trade Ministers of 159 members of WTO, managed to reach an agreement on December 6, 2013. The Bali Declaration has major implications for India and other developing countries. Of the two main issues-food security and trade facilitation-on which the agreement was reached, the former concerns developing countries, which need to subsidies food for poor, while the latter is significant for developed and developing countries both. The US Suggestion for a sunset clause of 4 years was not accepted. A final deal was struck to have an interim agreement until a more permanent arrangement was worked out.

That financial globalization may inflict risks of economic crisis was pointed by Justice Bhagwati, a staunch free trade supporter way back in 1998 came true when in 2008 the current global financial crisis was precipitated by a failure of America's financial sector, both to manage risks and allocate capital. This led Stieglitz a strong critic of globalization to observe thus: 'credit is contracting, output is falling, unemployment is increasing, and most assets values are falling, it is likely not only to long down turn, but also a deep turn. The failure of the market in the United States has had a contagion effect in terms of export of the U.S. recession to the rest of the world'.¹¹²

One predominant factor responsible for the occurrence of the economic crisis like the present one is the highly liquid and volatile nature of money flows from banks and investment firms to foreign markets. Such money flows can leave the country as quickly as they come. Further, investments by the investment firm are quite sensitive to both domestic and international developments. What is most disturbing indeed is the fact that no one controls financial markets. It needs to be recognized that the recent global financial crisis is in continuation of earlier episodes of financial crisis; the 1987 Stock Market Crisis; Mexico's Financial Crisis of 1994–1995, the East Asian Financial Crisis of 1994–1995, the Russian Crisis of 1998 and the Argentine default of 2001.¹¹³

To conclude with, while globalization offers huge opportunities for job and income growth in agriculture, industry and services, the way it has been implemented so far is far from satisfactory. It has reduced sovereign policy domain,

¹¹¹'Crisis Time for India (Again) at the WTO', A Correspondent, XLVIII(43) *Economic and Political Weekly*, October 26, 2013, at 32.

¹¹²Clapham, *supra* note 52, at 20; Dunne and Wheeler (eds). *Human Rights in Global Politics* (1999), especially Introduction and Articles of Ken Booth, Martin Saw, Cris Brown and Bhikhu Parekh.

¹¹³Ibid.

deeply affected the global economic environment, introduced risks and uncertainty in trade, industry, and finance, and above all caused pain and sufferings to the World's poor. As seen below, so far as human rights are concerned on the state level international law has failed to prevent the widespread deprivation of human rights, caused by shredded safety nets, environmental degradation, and other byproducts of globalization, or to alleviate the resultant human suffering. It is equally important to remember that inter-state mechanisms which could and should logically regulate the behavior of non-state actors, who are in fact the principal agents of globalization, are weak and the political will to strengthen them and create new ones is missing. The ensuing discussion seeks to highlight these aspects of human rights law in a more pronounced manner.

4 International Human Rights Law

The conventional story is that international human rights law arose from the ashes of World War II. People shocked by two World Wars and particularly atrocities committed by Nazis with Jews within their territory decided to take steps to prevent this happening again. Since in the beginning, the international community was reluctant to adopt human rights as law, the Universal Declaration of Human Rights, 1948 was presented as standards to be achieved by all peoples and nations, organizations and governments of the World. Although not a law, it created an expectation that governments would abide by it, or at least be seemed to be abiding by it. It soon became clear, however, that 'universal' human rights were not universal at all. In fact, the universality versus cultural relativity debate continues even today. In recent years, challenges to the universality of human rights^{[114](#)} have manifested in the assertion that human rights do not reflect 'Asian values', and that the time has come to review the Universal Declaration of Human Rights.^{[115](#)} The proposed Universal Declaration of Human Responsibilities which is said to reflect an Asian approach is seen as a challenge to the primary notions of state responsibility for the protection of all human rights and the inalienability of human rights.^{[116](#)} But we are also witnessing a re-orientation of human rights discussion through the establishment of international responsibilities for individuals and human rights organizations.^{[117](#)}

As is well known, the cold war gave rise to the question of priority of human rights. In order to facilitate consensus, two Covenants relating to two different

¹¹⁴*Id.*, at 23.

¹¹⁵See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms, 1998.

¹¹⁶International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights, 1966.

¹¹⁷See Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms, 1998.

categories of human rights were adopted in 1966.¹¹⁸ While the International Covenant on Civil and Political Rights¹¹⁹ recognizes rights relating to participation in public life,¹²⁰ and freedom from governmental interference in matters of conscience¹²¹, etc., the other Covenant¹²² enumerates social and economic rights, the second generation rights- rights to food,¹²³ clothing¹²⁴ and shelter,¹²⁵ health,¹²⁶ education,¹²⁷ work,¹²⁸ social security¹²⁹ and safe and fair conditions for work.¹³⁰ In addition to these Covenants, a large number of conventions and declarations dealing with specific issues have been adopted and signed. These cover issues of torture,¹³¹ minority rights,¹³² social discrimination,¹³³ children rights,¹³⁴ and the elimination of all forms of discrimination against women.¹³⁵ In addition to these categories of human rights, there is, in fact, a third type of rights—group or collective rights. Rights included in this category are the right to self-determination,¹³⁶ the right to development,¹³⁷ right to peace, right to food, right to disarmament,

¹¹⁸International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights, 1966.

¹¹⁹999 UNTS, 171.

¹²⁰the ICCPR, Article 28(2).

¹²¹*Id.*, Article 18(1).

¹²²999 UNTS, 3.

¹²³the ICESCR, Article 11(1).

¹²⁴*Ibid.*

¹²⁵*Ibid.*

¹²⁶*Id.*, Article 12(1).

¹²⁷*Id.*, Article 13(1).

¹²⁸*Id.*, Article 6(1).

¹²⁹*Id.*, Article 9.

¹³⁰*Id.*, Article 7(b).

¹³¹The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

¹³²The Framework Convention for the Protection of National Minorities, 1995 and Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.

¹³³The International Convention on the Elimination of All Forms of Racial Discrimination, 1966.

¹³⁴The Convention on the Rights of the Child, 1989.

¹³⁵The Convention on the Elimination of All Forms of Discrimination against Women, 1979.

¹³⁶See generally, B.C. Nirmal, *The Right to Self-Determination in International Law* (1999); Pomerance, *Self-Determination in Law and Practice* (1982); Sureda, *Evolution of Right of Self-Determination* (1973); M. Koskenniemi “National Self-Determination Today”, 43 *ICLQ*, 1994, at 241; B.C. Nirmal, “Autonomy and Self-Government in International Law” in TPPRC, *Tibetan Peoples’s Right of Self-Determination: Myth or Reality* (2000) pp. 17–69; B.C. Nirmal, “The Right of Self-Determination of the Tibetan People: Approaches and Modalities”, in TPPRC, *Tibetan Peoples’s Right of Self-Determination* (1996), pp. 44–77, *Ibid.*, “Aggression as Defined by the General Assembly”, 19 *Indian Year book of International Affairs*, 1986, pp. 343–349; R McCorquodale, “Self-Determination: A Human Rights Approach”, 43 *ILLQ*, 1994, at 857.

¹³⁷General Assembly Resolution 41/128; See Schochter, “The Emerging International Law of Development”, 15 *Columbia Journal of International Law*, 1976; P. Alston, “Revitalizing United

indigenous rights¹³⁸ and minority rights. There is still a lot of debate about the true position of these rights and modes of effective enforcement.

Although postmodernist scholars argue that human rights law is not in itself a good¹³⁹ and unmask the dark side of the Enlightenment,¹⁴⁰ a concept in which the very idea of human rights is rooted, human rights have a worldwide appeal and the development of human right law a seminal event in the history of humankind. Yet, the fact that different countries with different ideologies and social organizations have always given priority to one category of rights over the other cannot be denied. While both the United States and the free market support the Covenant on Civil and Political Rights, a quite distinct approach has been adopted by them in regard to the Economic Covenant. Thus, while the UN continues to insist on the inter-relationship, interdependence, and indivisibility of all human rights, the US still refuses to ratify the Economic Covenant. It is true that many States have ratified this Covenant but they too very often pursue policies incompatible with the provisions of the Economic Covenant and thereby deny distributive justice to the most vulnerable sections of society, which are everywhere disproportionately female. It may sound intriguing but is a stark reality that most states are more responsive to the needs of MNCs and investment firms than to the needs of the poor, powerless and voiceless segments of their populations.¹⁴¹ In the view of Elizabeth Iglesias, this reflects real politic. The welfare state cannot narrow the gap between rich and poor without the power to impose real redistribution on economic elites... without that power, any redistributive policies will come inevitably at the expense of macroeconomic health because they will be financed through inflationary spending rather than through real redistribution.¹⁴² Be that as it may, the main reason for lukewarm attitude of states towards social and economic rights is the positive nature of rights which require huge investment and heavy deployment of manpower for their realization. Most importantly, these rights are often in practice more important than civil and political rights. Without adequate food, for example, free speech or the right to vote is meaningless.

(Footnote 137 continued)

Nations Work on Human Rights and Development”, 18 *Melbourne University Law Review*, 1991, at 216.

¹³⁸B.C. Nirmal, *Supra* note 136; Barsh, “Indigenous People: An Emerging Object of International Law”, 80 *AJIL*, 1986, at 360; P. Thomberry, *International Law and Minorities* (1991); Phillips and Rosas (eds.), *The UN. Minority Rights Declaration* (1993); Sergio Ortino, “Minority Protection under International Law: Evolution or New Perspective”, 29 *the Banaras Law Journal*, 2000, at 183.

¹³⁹Pierre Schilag, *Laying down the Law: Mysticism, Fetishism and the American Legal Mind* (1996), at 3.

¹⁴⁰See generally Gillian Rose, *The Melancholy Science* (1978), at 18; Falk, *Explorations at the Edge of Time: The Prospects for World Order* (1992), at 10.

¹⁴¹Stark, *supra* note 1, at 535.

¹⁴²Elizabeth M. Leglesias, “International Law, Human Rights and Latcrit Theory”, 28 *Miami Inter-Am. L. Rev.*, 1997, pp. 1–77, quoted in Stark, *supra* note 1, at 535.

While the rights set forth in the Civil and Political Covenant are intended as binding legal obligations, same is not true of the Economic Covenant which in Article 2 provides that each state party undertakes to take steps to the maximum of its available resources ‘with a view to achieving progressively the full realization of the rights recognized therein’. Not only is the legal text weak, the machinery envisaged under the Covenant is also very weak. Under Article 16 of the Economic Covenant, States Parties were obliged to send periodic reports to Economic and Social Council (ECOSOC). Since 1987 the Committee on Economic, Social and Cultural Rights has been assigned the task of examination of States reports. But the Economic Committee is not autonomous and not responsible to the States Parties however it is responsible only for the Economic and Social Council. And as compared to other human rights treaty bodies this Committee has at its disposal only relatively weak means of implementation. It is hoped that after the Optional Protocol on Economic Covenant comes into force and became binding for the States Parties the implementation of this Covenant would improve. Particular difficulties facing the implementation of the Covenant stem from the perceived vagueness of many of the principles contained therein, the relative lack of legal texts and judicial decisions, and finally the ambivalence of many states in dealing with social and economic rights.¹⁴³ Another reason for poor implementation of the Covenant is the difficulty in obtaining relevant and precise information in view of the apathy and indifference of many non-governmental organizations in the area. Thus as Steiner notes, ‘inter-governmental human rights institutions, and with some market exceptions the NGOs as well have given neither priority nor even concentrated attention to the problem of realizing worker rights’.¹⁴⁴

The machinery for implementation of the Economic Covenant was until recent attitudes of the states receiving loans from the IMF and the World Bank towards it has been marked by a sense of helplessness and haplessness occasioned by the dictates of globalization. This is evident from the lack of any resistance by them to the SAP dictated by the aforesaid international institutions although slashing safety nets is incompatible with the Economic Covenant. Article 11 of the Economic Covenant could also be relied on to insist that MNCs set wages at a level sufficient to assure an adequate standard of living but no state has done so. Nor has any State relied on Article 12 of the Covenant to insist that MNCs comply with environmental standards necessary to preserve the right to health. It is Clear that remedy to this malady lies in removing the helplessness of the developing countries to resist the imposition of anti-poor reform policies of the international economic organizations. This in turn requires the establishment of a just, fair, equitable and reasonable international economic order.

Considering that existing mechanisms for protecting human rights are not effective in the context of globalization both the human rights law and the

¹⁴³M.N. Shaw, *International Law* (1997), at 230.

¹⁴⁴Steiner, *Introduction to Business and Human Rights: An Interdisciplinary Discussion*, held at Harvard Law School, December, 1997, at 11, quoted in Stark, *supra* note 1.

implementing machinery should be strengthened. In the words of Michael Posner, ‘To give practical meaning to economic and social rights.... it is necessary to develop more precise definitions and standards for these rights.... and to develop enforcement strategies on both national and international level.’¹⁴⁵ As the Economic Covenant is better realized at the national level, if the domestic law incorporates the same because in that situation lawyers can use domestic law to vindicate their clients’ economic rights more effectively, states should take steps necessary for incorporation of the Economic Covenant into their domestic laws.

Turning to the observance of human rights norms by international economic organizations, the transnational corporations (TNC) and Banks and investment firms, they by and large operate outside the rule of law and seldom care for human rights. As they are creation of states, given the political will it should not be difficult for them to make these organizations responsive to human rights norms and hold them accountable under the rule of law. So far as banks and investment firms are concerned, human right law is legally irrelevant. Although states can govern their own banks and investment firms, they are not bound under international law to do so. Surely, there is an urgent need to make investment capital responsive to human rights concerns, but for that purpose the existing international legal system cannot be relied upon because it is still weak and inadequate and the political will necessary for effecting major and rapid innovations in it is so far not visible.

Turning to regulation of TNCs, international law currently lacks the mechanism or procedures and also an appropriate theory to address this problem. Yet, there are various possible approaches and strategies through which the international community can make TNCs understand the relevance of human rights and realize that they too have responsibility under international law.

What emerges from the foregoing analysis is that the major economic players must be subject to ‘universal international law’ because ‘unless all states are bound, an exempted recalcitrant state could act as a spoiler for the entire international community’.¹⁴⁶ As these players control such vast flows of capital, it is only the system of international law which can hold them accountable in a comprehensive and meaningful way. In the past too, international law proved its enduring capacity to expand, change and adapt itself according to the pressing needs of time and there is no reason why it cannot address the problems discussed above if the global consensus necessary for doing so emerges.

While the classic international law which provides a system to deal with inter-se relations of the states, the international organizations and to a lesser extent with non-state entities and individuals is a must for regulating the conduct of major economic players, the rare insights that post-modernism offers to human rights law may also be useful to further human rights. Post-modernism, it may be noted, refers

¹⁴⁵Michael Posner, “Foreword: Human Rights and Non-Governmental Organizations on the Eve of the Next Century”, 66 *Fordham L. Review*, 1997, pp. 627,628.

¹⁴⁶Jonathan Charney, “Universal International Law”, 87 *AJIL*, 1993, pp. 523, 529 (observation made in the context of environment).

to at least three distinct but related conceptions ‘fragmentation and discontinuity’,¹⁴⁷ ‘incredulity towards meta narratives’¹⁴⁸ and the cultural logic of late capitalism’.¹⁴⁹ It exposes the dark side of the Enlightenment which conceals ‘will to power’, challenges the assumption that human rights law is in itself a good and suggests a shift in focus from theory building to story telling. It views international law not as a system at all but rather a superstore, a warehouse of treaties, customs, institutions and norms and human rights law as a source of norms that poor people, particularly ‘Women can draw upon to support a virtually endless range of ad hoc strategies’.¹⁵⁰ Besides, Postmodernist approach to international law shifts the focus from definitions of equality, and the hidden subject who is doing the defining, to questions of political strategy-how variously suited women can use economic rights law.¹⁵¹ It recognizes the many performative roles¹⁵² of economic rights law and asserts that many women are better sewed by political rhetoric¹⁵³ rather than legal semantics. In sum, post-modernism offers some more useful frameworks for ‘economically subordinated women’ [and men] seeking to ‘grapple with globalization.’¹⁵⁴ Thus, while from a classical perspective, presenting a legal claim before a tribunal is the only effective mode of realizing economic rights, the postmodernist approach emphasizes the need of developing other strategies, global networking of poor and women and ensuring their voice in international forums.

5 Conclusion

The multiple and contradictory consequences of globalization and new challenges that they pose for international law, particularly human rights law have potential to undermine the traditional mechanisms for the protection of human rights. The decline in power of the state and its capacity to control economic matters and to

¹⁴⁷David Harvey, *The Condition of Post Modernity: An Enquiry into the Origins of Cultural Change* (1989), at 44.

¹⁴⁸Lyotard, *The Postmodernism Condition: A Report on Knowledge* (1984), at XXIV. (See Footnote 149) Fredric Jainson, *Post-Modernism or the Cultural Logic of Late Capitalism* (1991). (See Footnote 150) Stark, *supra* note 1, at 504.

¹⁴⁹Fredric Jainson, *Post-Modernism or the Cultural Logic of Late Capitalism* (1991). (See Footnote 150) Stark, *supra* note 1, at 504.

¹⁵⁰*Id.*, 551.

¹⁵¹*Id.*, 551.

¹⁵²Performative roles include persuasions, justification, identification or organization of a political grouping and motivational orientation. Piere Sehlag, “Values”, 6 *Yale Journal of Law and Human Rights*, 1994, pp. 219, 228.

¹⁵³Political rhetoric refers to the range of persuasive arguments for new legal norms that may be addressed to policy makers. Grass root groups, and other constitutions, See Stark, *supra* note 1, at 547.

¹⁵⁴Stark, *supra* note 1, at 504.

some extent also political matters, on the one hand and backlash against the homogenization of culture in the wake of globalization, as manifested in recent assertion of ethnic or other identities, and the rise of religious fundamentalism, excessive nationalism, ethnic cleansing and terrorism, which also seem to be fuelled by the process of globalization, on the other, not only weaken the regulatory capacity of states which are traditionally expected to protect human rights, but also present serious threats to human dignity and human rights.

International law has played a significant role in promoting globalization, yet it has miserably failed to prevent the widespread deprivation of human rights of the World's poor. The failure of international law to regulate the principal agents of globalization multinational corporations, banks and investment firms, and international economic organizations, and to insist that they respect their human rights responsibilities and also to make them accountable under the rule of law for any violations they commit has serious implications for developing countries and the World's poor. The Economic Covenant is ignored not only by the principal agents of globalization but even by those states which have ratified it. Not only the obligations that the Economic Covenant create are vague even the machinery for its implementation is weak¹⁵⁵ and the NGOs taking interest in the realization of social and economic rights are few in number.

Globalization may have received some temporary setback because of the recent economic crisis, but it has by now become such a powerful force that it is unstoppable and has come to stay as feature of the world economy. It is therefore necessary that the adverse consequences of globalization for human rights be addressed in an effective manner. The possible way to tackle this problem is to promulgate standards, to streamline procedures and to develop enforcement strategies at both national and international levels. In devising the needed strategies and programmes due attention should also be given to the profoundly gendered structure of the law and to insights that post-modernism offers in regard to human rights law.

The current course of globalization is too narrow, limited to globalization of trade and culture and does not cover globalization of labour and knowledge. Sadly, even economic globalization has not yielded the kind of benefits envisaged earlier, it has not led to markets becoming genuinely free. Further, market forces by themselves can neither deliver the desired economic growth nor can it be expected to perform those social welfare activities which were earlier done by the state because their main concern is to earn huge profits and not to address the social objectives. The financial crises fuelled by globalization have introduced risk and uncertainty in trade, industry and finance. The worldwide struggle for competitive advantage has had detrimental impact on environmental protection. As globalization is real and seems to be irreversible, the problem before us is how to make it

¹⁵⁵It is hoped that with the coming into force of the optional Protocol of the International Covenant on Economic, Social and Cultural Rights, Implementation of the Covenant will improve. For details regarding the Protocol, See B.C. Nirmal, "Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", 50(III) *IJIL*, 2010, pp. 380–411.

authentic and genuine so that its benefits can reach equitably to poor countries and to poor people within the developing world. It requires a political, economic, ethical and spiritual vision based on respect for human rights, human dignity, equality, peace, democracy, mutual responsibility and cooperation, and full respect for the various religious and ethical values and cultural backgrounds of people. In consonance with this vision World's leaders must come forward with strong commitments to global ethics, justice and respect for the human rights of all people and human well-being as the end, with open markets and economic growth as means.

While globalization poses new challenges to the protection of human rights, the space it provides, the rise of transnational society, ideas and methodologies represented by good governance and democratic entitlement provide new opportunities to re-structure the international human rights system and shape the structure and practice of what Professor Falk has aptly called 'humane governance'.

But the need to make globalization inclusive, equitable, beneficial for all and humane can be realized only when the reasons responsible for the impasse in the Doha Round negotiations are overcome and concerns of developing as well as advanced countries are addressed in the spirit of mutual accommodation and cooperation. Unfortunately, the WTO round negotiations have apparently moved away from its core premises and principles of the multilateral trading system and instead of taking up core development issues such as job-creation, food security, and sustainable development now focus on new issues which in turn has dented the credibility of the rules-based multilateral trading systems itself. It was hoped that the 9th WTO Ministerial Conference, held in Bali, during December 2013 despite its limited agenda items viz. agriculture, trade facilitation and limited address to secure special and differential language under the WTO Agreements, shall revive the Doha Round and move the post- Bali negotiations towards these issues,¹⁵⁶ but the outcomes of the Conference in the form of trade facilitation and food security deal shows that it all depends on the attitude of the industrialized WTO member States towards the core issues of priority for developing countries like 'food security' and on their willingness to address favourable needs of developing countries in terms of facilitating trade through national and regional infrastructure and building trade capacity and the special and differential treatment dimension in trade facilitation negotiations. The fact that an agreement was possible at Bali at all is seen to be as significant achievement; however, the acceptance of an interim agreement on food security until a more permanent arrangement was worked out casts doubt on rules-based multilateral mechanism's ability to address the human right concerns of developing nations.

¹⁵⁶ANND News Letter, 'on the Way Towards the 9th Ministerial meeting of the WTO; Some Issues for Consideration Part I', available at: <http://www.annd.org/english/data/wto/file/9pdf.pdf>. [accessed on December 1, 2013].

Chapter 15

National and International Perspectives of IPR Laws with a Focus on Some *Sui Generis* Options

Sudhir Kochhar

1 Introduction

Until 1 year from the date of enforcement of World Trade Organization (WTO), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), which intends to provide level-playing field for the national intellectual property rights (IPR) domains, did not apply to any one of its members, including the developed countries. Further, there were substantial transitional periods of 10 and 15 years, for developing and least-developed countries, respectively. Such waiting periods aimed at achieving desired transformation of national IPR regimes into harmonized systems as per the Agreement. India and many other developing countries matched these dates by the amendment, enactment and/or implementation of relevant national IPR laws, regulations and administrative procedures. However, there could have been a limitation in the attainment of adequate domestic transformation, as envisaged by the TRIPs, by the developing countries due to their ‘developing’ economic state. On the other hand, concerns for food and nutritional security also obviously predominate in the polity of these countries.

With reference to the provisions for the protection of IPR, the TRIPs Agreement is elaborate, comprehensive and balanced but highly complex. Coupled with this, there are conflicting perspectives and varying national interests of the WTO member countries. Nevertheless, TRIPs includes general principles, substantive norms for the protection of various forms of IPR, obligations with respect to domestic enforcement, and dispute settlement. Rules regarding ownership of land rights over plants, animals, including microorganisms, and biological processes for production thereof are described in the section on Patents. Various provisions for the management of patentable subject matter are covered in Article 27 of TRIPs (Box 1).

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Box 1 ‘27.1 Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.

27.2 Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.

27.3 Members may also exclude from patentability:

(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(b) plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement’.

India amended the Patents Act 1970 thrice, i.e. in 1999, 2002 and 2005, to harmonize the patent law with TRIPs. The provision for grant of product patents in all fields of invention, including the food and chemical substances, was made in the amendment 2005, whereas the provision under section 3(j) to harmonize with TRIPs Article 27.3(b) was incorporated in the amendment 2002. Accordingly, plants and animals in whole or parts thereof are excluded from being patented in India. Plant varieties are protected in the country under the Protection of Plant Varieties and Farmers’ Rights Act, 2001. Also, there is provision under the Geographical Indications (Registration and Protection) Act, 1999 to register agricultural goods for their commercial use.¹

The TRIPS Agreement was slated for review, 4 years from the date of its enforcement particularly for the provisions related to patents on inventions concerning biological forms or parts thereof. However, the world is still seeking adequate build-up of a broadly harmonious trade-related IPR regime. This expected harmony includes accord with environment and biosafety regimes, conservation of

¹S. Kochhar, “Institutions and Capacity Building for the Evolution of Intellectual Property Rights Regime in India: IV—Identification and Disclosure of IP Products for their IPR Protection in Plants and Animals”, 13(4) *Journal of Intellectual Property Rights*, 2008, pp. 336–343.

biological and genetic resources for sustainable use, and equitable benefit sharing of the exclusive commercial gains from access to these resources. In order to achieve the dual objective of promoting agribusiness, including the business under exclusive domain of IPR, and mitigating food insecurity on the earth planet,² conservation, both on farm in-situ and ex-situ, for sustainable use of genetic resources; research in the crop improvement and variety identification programmes; as well as genomics, proteomics, and molecular breeding, etc., requires continuous attention of both public and private sectors.

2 Trips, Patenting and Doha Round

The issue of negotiations for review of TRIPs (Annex 1C of the Marrakesh Agreement)³ in the Doha Round received mixed response from WTO members.⁴ A number of dispute cases concerning IPR in agriculture field (Table 1) have been viewed and decided by WTO panels and the Appellate Body under the terms of the TRIPs Agreement, and some other dispute settlement claims initiated by members and then withdrawn.

Some policy analysts have opined that the patent pathology that is killing important innovations and awarding dubious patent claims⁵ needs to be thoroughly addressed. It has been discussed that TRIPs establishes both intellectual property rights and the right of foreigners to own property;⁶ to enable foreign ownership, the Agreement imposes national treatment obligations, requiring states to treat foreigners as equals of their own citizens. This cocktail of robust private property rights and foreign access thereto, according to authors, is leading to a steady transfer of ‘ownership’ of intellectual ‘products’ from developing world to developed world. Whereas, as per the spirit of TRIPs, Nations are free to determine their policies for encouraging innovative development and growth of their technologies and industry. A suitable national policy as well as compatible regulatory and legislative environments can boost the innovative R&D to harness the opportunity for ‘technology-push and market-pull’ across the WTO member countries. This can also create win-win situations among the inventors and industry on a global basis.

The obligation under TRIPs, Article 27.3(b), is broad-based as the member countries may provide for legal protection to new varieties of plants in their

²S. Kochhar, “Exploring Path to Equilibrium Among Competitiveness, Sustenance and Evolution in the Current International Trade Regime”, *International Conference on Food Security & Environmental Sustainability*, 2009, Indian Institute of Technology, Kharagpur, 2009, pp. 1–11.

³WTO, 1994, available at: www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

⁴WTO, 2001, available at: http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm.

⁵IATP, U.S. on TRIPS: No Can Do, Institute for Agriculture and Trade Policy, Washington D.C., 2008, available at: <http://www.iatp.org/blog/2008/07/us-on-trips-no-can-do?page=1>.

⁶Chander Anupam and Madhavi Sunder, “Who Pays For the Public Domain?”, 2008, available at: <http://vecam.org/article1077.html>.

Table 1 Some dispute cases among WTO Members concerning TRIPs provisions affecting IPR in agriculture field

Dispute No./ Date	Dispute with	Complainant	Dispute	Alleged TRIPs violation	Result
<i>Patents</i>					
DS36/ 30 April 1996	Pakistan	United States	Patent applications for pharmaceutical and agricultural chemical products and Exclusive Marketing Rights	Articles 27, 65 and 70	Mutually Agreed solution reached
DS50/2 July 1996	India	United States	Articles 27, 65 and 70, 70.8 (a), 70.9	Articles 27, 65 and 70	Patents (Amend-ment) Ordinance, 1999
DS79/28 April 1997	India	European Communities		Articles 27, 65, 70, 70.8 (a), 70.9	
DS153/ 2 Dec 1998	European Communities	Canada	Discriminatory patent term for pharmaceutical and agricultural chemical products	Article 27.1	Consultations
DS171/ 6 May 1999 and DS196/ 30 May 2000	Argentina	United States	Patent protection for pharmaceuticals and test data protection for agricultural chemicals	Articles 27, 28, 31, 34, 39, 39.2, 50, 62, 65 and 70	Mutually Agreed Solution reached
DS199/ May 2000 and DS224/ 30 Jan 2001	Brazil	United States	'Local working' measures affect patent protection/ Federally funded invention to be manufactured substantially in the US	Articles 27, 27.1, 28, 28.1	-do-
<i>Geographical Indications</i>					
DS290/ 17 April 2003	European Communities	Australia	Co-existence of Geographical Indications with prior Trademarks for Agricultural Products and Foodstuffs	Articles 1, 3, 4, 2, 10, 16, 20, 22, 22.2, 24, 24.5, 41, 42, 63, 63.1, 63.3, 65, 65.1	Australia & USA not satisfied with further measures taken by EC
<i>Trade Marks</i>					
DS174/ 1 June 1999	European Communities	United States	-do-	Articles 3, 3.1, 4, 1.1, 2, 2.1, 16, 16.1, 20, 22, 22.1, 22.2, 24, 24.5, 41.1, 41.2, 41.4, 42, 44.1, 63, 63.1, 63.3, 65, 65.1	Dispute not fully resolved

Source WTO Documents; Compiled

jurisdictions; whether by the grant of patents or by an effective *sui generis* IPR system of plant variety protection or any other appropriate system combining the two. Article 27.3 also defines patentable subject matter broadly, wherein patentable microorganisms and non-biological and microbiological processes for the production of plants or animals must be patented by all members but they may or may not patent plants, animals and essentially biological processes for their production. The general enforcement obligations under Article 41.1 of TRIPs Agreement require the WTO members to ensure that their IPR laws are TRIPs-compatible.

The TRIPS Agreement is silent on the eligibility criteria for the plant varieties to qualify for such patent or *sui generis* IPR protection. However, by default, the Paris Convention, 1883⁷ and the Convention of the Union for Protection of New Varieties of Plants (UPOV), 1961⁸ provide the basis for developing national laws on patents and plant variety protection (PVP), respectively. In addition, protection for new varieties of plants can also be availed under the Plant Patents statutes of USA⁹ or general (utility) patent law of the respective countries that provide for such protection.

(a) *Patents*

The world intellectual property indicators 2011 brought out by WIPO¹⁰ make an interesting comparison of the patent data by origin and destination. A representative sampling of such comparative statistics from 10 national patent offices (Fig. 1) revealed that the Russian and Chinese resident applicants almost entirely (>95%) preferred to capture the domestic markets whereas, on the contrary, nearly three-fourth of the patent applications made by the Canadian residents were filed abroad. Nevertheless, China also showed significant visibility in terms of number of applications filed abroad by the resident applicants, particularly in USA (8162), Europe (2049) and Japan (1063). Indian applicants have filed 5290 applications in 15 jurisdictions in the year 2010, which include over 71.6% (3789) applications in USA alone. Japan, USA and Germany led in terms of number of applications filed abroad by their residents at the select 10 patent offices, whereas Australia, France and U.K. followed Canada in terms of per cent applications filed abroad. The patent applicants' strategy to avail the opportunity provided by TRIPs Agreement coupled with national policy environments could also be governed by other (non-IPR) factors, particularly the competitiveness, the technology edge and the market forces.

Trends in terms of national phase filing of PCT applications for biotechnological products like the transgenic events, stress-responsive genes, quantitative trait loci

⁷The Paris Convention, 1883, available at: <http://www.wipo.int/treaties/en/ip/paris/>.

⁸The UPOV Convention, 1961, available at: <http://www.upov.int/en/publications/conventions/>.

⁹United States Code Title 35 Patents, available at: http://www.uspto.gov/web/offices/pac/mpep/consolidated_laws.pdf. Chapter 15—Plant Patents.

¹⁰WIPO, 2011, World Intellectual Property Indicators, WIPO Economics and Statistics Series, 2011, World Intellectual Property Organisation, Geneva, at 211.

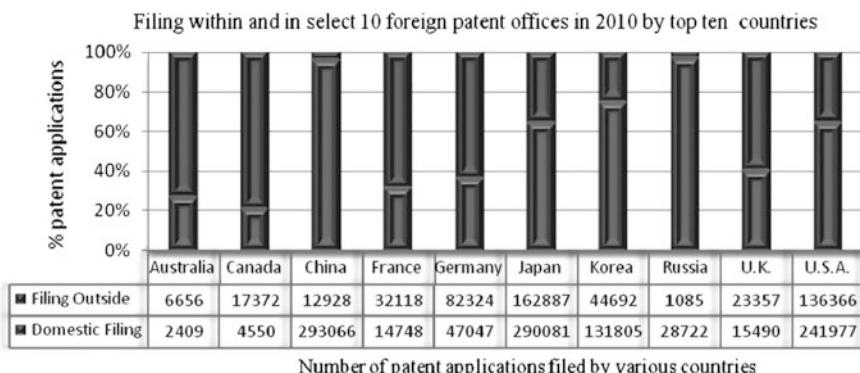


Fig. 1 Patent application filings by resident applicants and trends at 10 patent offices. *Source of data* WIPO. 2011. World Intellectual Property Indicators

(QTL) for improvement of traits influenced by polygenes, etc. are increasing,¹¹ which may positively affect the future agriculture. However, ethical and public order issues continue to revolve around these developments.

(b) *Plant Variety Protection*

Like the patenting scenario, the field of plant variety protection (PVP) has shown distinct and differential interests and growth among the WTO members. Providing legal protection for new varieties of plants in developing countries has been a relatively new development in international law covering the intellectual property rights (IPR), which resulted from the obligation under the TRIPs Agreement, for the WTO Members. Transition from public to proprietary varieties in agriculture in developing countries is swayed by uncertainties and fear, and the same could be true for exclusive technological products in many other fields of agriculture. In countries like India, the performance of the extant varieties has been particularly satisfactory. It may not be reasonable to quickly replace them with new varieties, not tested for their adaptability and performance value of their cultivation and use. Availability, access and affordability of quality seed and other agricultural inputs by marginal and small farmers may also be affected by the IPR and other related regulatory regimes.

The Union for Protection of New Varieties of Plants (UPOV) developed and perpetuated standards as well as test guidelines for the distinctness, uniformity and stability (DUS) parameters for varieties to qualify for their IPR protection. UPOV had also given a free hand to countries to *de novo* adjudge the novelty of varieties of newly notified genera and species, to which the IPR provision is to be applied for the first time in the country. This obligation, however, may not be applicable on the

¹¹Kochhar, "Analysis of Opportunities and Challenges in IPR and Agriculture in the Indian Context", 16(2) *Journal of Intellectual Property Rights*, 2011, pp. 69–73.

Table 2 Augmentation of PVP Titles under UPOV Convention

Year	Number of applications/Titles			
	Filed	Granted	Ceased	Cumulative
2006	12,262	9770	5458	70,810
2007	13,186	10,361	4535	76,511
2008	12,698	10,471	5408	81,595
2009	13,022	10,730	5956	86,484
2010	13,013	11,110	7380	90,214
Average	12,836	10,488	5747	4741 (Average annual addition)

Source UPOV Database/UPOV Document C/45/7

basis of reciprocity for other countries. On the other hand, the inter-country interdependence for their crops and genetic resources is well established. Therefore, WTO members need to work out, in accordance with the TRIPs, the best mode use of extant variety protection provision under their *sui generis* PVP laws. Some of the possible answers for uniform implementation of TRIPs includes enhanced public-private partnerships, more emphasis on licensing of the existing, well-adapted materials for further breeding and research, and cross-licensing of varieties of common knowledge with differential commercial prospects.

The UPOV report on impact of plant variety protection¹² has highlighted a sizeable growth in its membership as well as the number of plant variety titles in force in the member countries (Table 2). The WTO members that are not party to UPOV so far include many countries from South and Southeast Asia, Middle East, North Africa and South America. Some of these countries like India, Thailand and Philippines have enacted *sui generis* legislations and have shown progress in the protection of new plant varieties whereas some other countries are yet to develop their PVP laws (Fig. 2).

Innovation is involved in discovery and development of new varieties but the degree and intensity of human intervention may vary considerably in various conventional and biotechnological approaches of variety development. Grant of a plant variety title or plant patent or utility patent to concerned breeder is thus subjective and situation-specific. The policy environment and the legislative provisions in a country where the grant is sought would be as important as the nature of variety and the criteria it meets to qualify for intellectual property protection. A patent or PVP title would allow the breeder to exclude others from production and commercialization of seed and other propagating material of the protected variety, including their import into territory of the granting country.

¹²UPOV Report on the Impact of Plant Variety Protection 2005, at 98, available at: http://www.upov.int/export/sites/upov/about/en/pdf/353_upov_report.pdf.

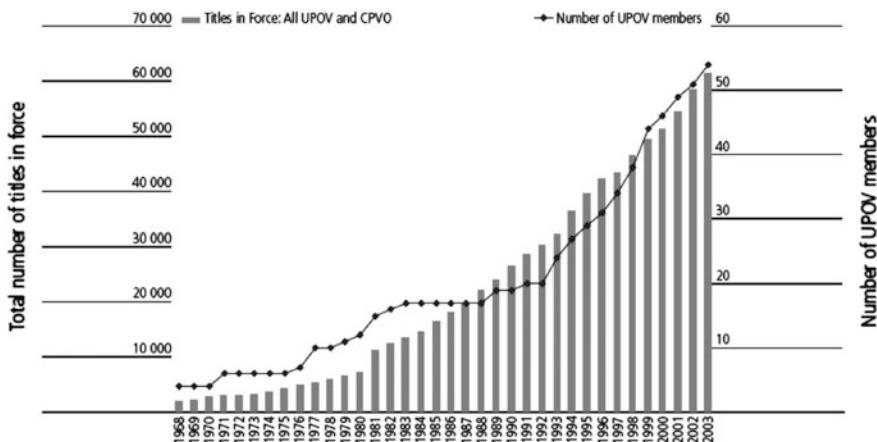


Fig. 2 Growth of Plant Variety Protection System under the UPOV Convention. Source UPOV, 2005. UPOV Report on Impact of Plant Variety Protection available at http://www.upov.int/export/sites/upov/about/en/pdf/353_upov_report.pdf

(c) Use of Alternative Options to Grant Plant Variety Protection

To have a gross assessment of the three alternative forms used for the protection of plant varieties, number of titles granted under the three alternative forms were compared. It was observed that 90,214 titles on plant varieties were in force in the UPOV member countries in 2010.¹³ Few titles may be added to this big number as being the grants in India and other UPOV non-member countries that have resorted to other *sui generis* PVP options. The UPOV database also showed that 13,570 plant patents were in force in USA in 2010. However, advanced search for Application Type (APT) for Plant Patents at the USPTO website as on 27.5.2012 showed 11,020 hits, which is yet again a sizeable number for this US-specific category. It would be difficult to measure the number of utility patents on plants and plant varieties granted worldwide, and no gross estimates are intended. However, grossly indicative figures for a comparative assessment were drawn through patent search for a number of grants in USA and worldwide for ‘plant’ in title and abstract in the patent databases of USPTO and EPO, which turned out to be 47,794 and >100,000, respectively (Fig. 3).

Thus, broadly it may be implied from this overview that PVP format of protection for plant varieties is as acceptable to the seed industry as the patent formats. Factually, in context of TRIPs, PVP is only a sub-set of patents rather than being a separate standard of IPR. Popularly also called as ‘soft patent’, the PVP format suits well the plant breeding systems. It is a *sui generis* form of IPR protection which encompasses provision of legal action against any act of infringement for effective

¹³Plant Variety Protection Statistics for the Years 2006–2010, UPOV Document C/45/7, 2011, at 17, available at: http://www.upov.int/edocs/mdocs/upov/en/c/45/c_45_7.pdf.

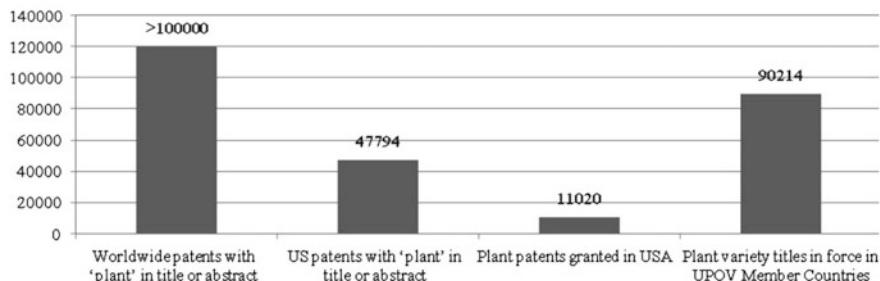


Fig. 3 Comparative use of patent, plant patent and PVP options as determined from respective public databases. *Source* Compiled; *data source* search@espacenet, USPTO and UPOV

enforcement and respects basic principle of national treatment without differentiation. Further, corresponding to the TRIPs requirement of providing patents in all field of technology, the PVP system (UPOV 1991) also provides for protection to plant varieties of all taxa of the plant kingdom. An analysis of the growth of PVP system, projected from UPOV database, shows interesting dimensions of institutionalization and implementation part. The plant variety protection statistics for the years 2006–2010 (UPOV Document C/45/7) (Table 2) indicates that on an average 12,836 PVP applications were filed in UPOV member countries over the 5 year period; 10,488 titles were granted per year and 5747 titles ceased to exist in the corresponding year (due to various reasons like the completion of term, cancellation, annulment, etc.), and thus on an average 4741 new PVP titles were added to the previous year's cumulative total, per annum. However, a concern is that number of pending applications also kept on burgeoning at a rate of 2348 applications annually.

3 Doha Perspective

The PVP and plant patents are expected to be licensed for commercial use and trade, much more frequently as compared to the utility patents. The latter are preferred to create and retain market monopolies by large enterprises. Both the options, however, will lead to economic growth and development, which are the goals of multilateral trading system embodying the WTO. The international trade system was also advocated to play its role in the alleviation of poverty through the promotion of economic development. The process of economic build-up of particularly the developing countries under the world trade regime has, however, been slow. The Doha round¹⁴ noted this concern and urged for taking further steps to facilitate their recovery from slow pace, growth, sustainability and further

¹⁴The Doha WTO Ministerial Declaration, 2001, WTO Document: WT/MIN(01)/DEC/1, available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

development. TRIPs have been an important part of the package of agreements under the WTO and, therefore, its effective, uniform and transparent implementation could have an important bearing on the consequential development and sustainability under the exclusive market zone.

All national, regional and global efforts aimed at increasing the availability/supplies of nutritious, safe and affordable foods for the ever-increasing population, especially in developing countries have unequivocal support of the international community. It is understood that protection of trade related intellectual property might not be the only appropriate measure to achieve that goal. Yet the WTO system's claim that TRIPs provides a level-playing¹⁵ field needs to be more properly understood and realized to the fullest possible extent. There is need to simplify the theory and application of IPR for its effective day-to-day reach by the developing and the lesser privileged members.

Broadening the discussion, the Doha Declaration, 2001¹⁶ stated that TRIPs, guided by its objectives (Article 7) and principles (Article 8), should also be looked for its relationship with other major international developments like the CBD, and the protection of traditional knowledge (TK) and folklore. The issues of sustainable development,¹⁷ environment protection, conservation of and access to biological diversity,¹⁸ biosafety,¹⁹ food safety, ethics in molecular genetic manipulation of biological materials for improvement and development, and sharing of commercial benefits on the principles of equity are generally pitted against intellectual property protection and royalties, etc. Whereas it would be more desirable, and prudent, to realize the complementary strengths of these facets. The Doha round favoured to implement the TRIPs Agreement in letter and spirit, while considering the scope and modalities for complaints (Table 1) of the types provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 (Box 2).

Box 2 Article XXIII: Nullification or Impairment: 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impounded as a result of (a) the failure of another contracting party to carry out its obligations under this agreement or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory

¹⁵S. Kochhar, "R & D Approaches in Relation to WTO Agreements: Indian Perspective in Agriculture", National Seminar organised by the Indian Society of International Law, New Delhi. 6–7 April 2002, pp. 1–15.

¹⁶*Supra* note 15, para 19.

¹⁷UNEP, 1991, Earth Summit: Agenda 21, The United Nations Programme of Action from Rio, United Nations, New York, at 294.

¹⁸The Convention on Biological Diversity, 1992.

¹⁹The Cartagena Protocol on Biosafety, 2001.

adjustment of the matter, make written representations or proposals to the other contracting party or parties, which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

The Doha Ministerial decided that in the meantime the WTO members should not initiate such complaints under the TRIPs but make efforts to work out mechanism for ensuring the monitoring and full implementation of the obligations under the Agreement. It was also required that the developed country members should submit detailed reports on the functioning in practice of the incentives provided to their enterprises for the transfer of technology for review on annual basis.

4 Key Issues Vis-a-Vis Developing—Developed Concerns

The WTO members have clearly reflected a developing—developed divide in a wide range of issues (Table 3) brought forward for the TRIPs review. Broadly, these issues revolve around the patenting of life forms and their parts, protection of genetic resources and traditional knowledge built around their use, removing disparity in the protection of geographical indications of agricultural goods, mitigating biopiracy, etc.

TRIPS and CBD

The overall relationship between TRIPs and CBD is confronted on two counts, namely, (i) whether there is any conflict between the two? and (ii) how TRIPs could ensure a non-conflicting and mutually supportive application of these two important instruments of international law affecting sustainable use of biological diversity for development? The official analysis of members' opinion by WTO²⁰ suggested that members having the opinion that there is no conflict between the two are also of the view that countries can implement the provisions of TRIPs and CBD in mutually supportive manner through national measures, whereas it was felt by a few other members that there is need to further determine whether the patent system calls for any international action. Some developing country members including Brazil and India were in favour of some international action in relation to the patent system, which may ensure/ enhance the mutual supportiveness of the two agreements, whereas members like African group, Latin America, etc., were in favour of TRIPs amendment to resolve its inherent conflict with CBD.

In respect of the 'inherent conflict' views, two main reasons may be seen. First, the TRIPs requires certain genetic material to be patented or protected by *sui generis* PVP. The argument built is that by not preventing patenting of genetic

²⁰“The Relationship between the TRIPs Agreement and the Convention on Biological Diversity”, WTO Document IP/C/W/368/Rev.1 Dated 8 February 2006 (06-0534).

Table 3 Key issues expressed by WTO Members in relation to TRIPs review concerning the agriculture field

Issues
• Relationship between TRIPs and CBD and protection of Traditional Knowledge (TK)
• Disclosure of the origin and source of genetic resources & TK in patent applications/TRIPs Article 29bis
• Disclosure of evidence of prior informed consent under the relevant national regime
• Disclosure of evidence of benefit sharing under the relevant national regime
• Patent system and genetic resources
• Combating biopiracy
• Article 27.3(b); patenting of life forms and part thereof
• Special protection to certain agricultural goods as GI of developing countries
• Implementation of TRIPs review under Article 71.1

Source Compiled from WTO database

material, TRIPs favours appropriation of such material by private parties, which could be inconsistent with the CBD agreement on sovereign rights of countries over their genetic resources.²¹ Second, the TRIPs allows patenting or PVP of genetic material without ensuring implementation of the CBD provisions like prior informed consent and benefit sharing.²²

The ethical issues emerging from the differential perception and acceptance of Article 27.2 of TRIPs considerably affect a uniform implementation of TRIPs by the WTO member countries. Protection of *ordre public* or morality, including the protection of human, animal or plant life or health or avoiding serious prejudice to the environment are subjective terms, which allow countries to make differential exceptions to patentability of life forms and parts thereof in their respective jurisdictions. Further, some developing countries have seriously proposed to amend TRIPs Article 27.3(b) to universally make life forms and parts thereof non-patentable. These countries, like the African group are of the view that at least patents for inventions based on TK and essentially derived products and processes should not be allowed. Amendment of TRIPs is also sought to disallow patents

²¹African Group, IP/C/W/404, IP/C/W/206, IP/C/W/163, IP/C/M/40, paras 76–79; Kenya, IP/C/M/47 para. 68, IP/C/M/36/Add.1, para. 233, IP/C/M/28, para. 144, available at: www.wto.org.

²²Brazil, IP/C/W/228, IP/C/M/48, para 37, IP/C/M/29, paras 146 and 148; IP/C/M/28, para 135, IP/C/M/27, para 122; Brazil et al., IP/C/W/429/Rev.1, IP/C/W/356; Colombia, IP/C/M/46, para 57, IP/C/M/36/Add.1, para 209; Ecuador, IP/C/M/47, para 49, IP/C/M/25, para 87; EC, IP/C/W/383, IP/C/W/254, IP/C/M/48, para 63, IP/C/M/39, para 127, IP/C/M/37/Add.1, para 226, IP/C/M/35, para 233; India, IP/C/W/198, IP/C/W/195, IP/C/M/48, para 52, IP/C/M/36/Add.1, para 212, IP/C/M/30, para 169, IP/C/M/24, para 81; Indonesia, IP/C/M/47, para 51, IP/C/M/36/Add.1, para 217; Peru, IP/C/W/447, IP/C/M/48, paras 18–19; Thailand, IP/C/M/48, para 61, IP/C/M/25, para 78; Turkey, IP/C/M/47, para 63, IP/C/M/27, para 132; Venezuela, IP/C/M/40, para 102, IP/C/M/36/Add.1, para 208, IP/C/M/32, para 136, IP/C/M/28, para 165, available at: www.wto.org.

inconsistent with Article 15 of the CBD.²³ India, along with Brazil and some other developing countries expected that TRIPs amendment should cover the disclosure of source and country of origin of bioresources and/or TK used in an invention. At present, the TRIPs Article 29.2 provides that WTO members should lay conditions for patent applicants to provide information concerning their corresponding foreign applications and grants. Whereas Brazil suggested that an Article 29bis may be added to meet the requirements of disclosure of source of genetic resources and traditional knowledge. These views have been contested by some developed countries including Norway and Switzerland. Nevertheless, India has already realized the importance and need for such legal provisions in the Patents Act for disclosures of source of GR and TK, which was amended accordingly.

Protection of Undisclosed Information and TRIPS

As per the TRIPs Article 39.3, members shall protect applicants' data submitted for undisclosed tests or other data involving considerable effort against unfair commercial use, as a condition of approving the marketing of agricultural chemical products that utilize new chemical entities except in public interest. So far, in India, there is no provision in the Insecticides Act, 1968 to keep certain data, submitted by applicants to the regulatory Authority, as secret. However, there is increasing dialogue/tendency to bring in the data protection element in the Indian IPR law.

Plant Variety Protection and Seed Business

IPR policy can be a tool to promote development, particular in respect of access to genetic resources, technology transfer or food security. Implementation of the Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act is working well in the country although India is not member of UPOV convention and thus the Indian residents cannot avail the benefits of the UPOV platform in terms of the protection of plant varieties of Indian plant breeders. At present, the PPV&FR Authority is focusing on building reciprocal relationships with other country plant variety offices, which can eventually help the Indian applicants aspiring to seek protection of their new varieties in other countries. The TRIPs review should also focus on developing greater cooperation among members in the field of plant variety development, protection and seed trade, including access to genetic resources, technology transfer and, thereby, food security. The PPV&FR Act reflects a genuine attempt to implement TRIPS Agreement in a way that also supports the socio-economic interests of all the producer groups in the country—private sector seed companies, public seed corporations, agricultural research institutions and universities, and resource poor farmers. Initially, seed trade in extant varieties of India with other trade partner countries should have been promoted to provide better access to well-adapted materials and genetic resources across the national boundaries. The EU provides a good example of regional PVP entitlements through the Community Plant Variety Rights Office (CPVO) at Angers, France. An effective relationship of the PPV&FR Authority with CPVO of EU would be obviously meaningful.

²³India, IP/C/W/196, IP/C/M/37/Add.1, para 224, IP/C/M/25, para. 70, available at: <http://www.wto.org>.

Biopiracy

There is a need to move in the direction of effective bio-partnerships²⁴ rather than frightening with terms like biopiracy. The idea of ‘bio-partnership’ is important in terms of ethics and equity. Since biopiracy is seen as a growing problem, there is a need to harmonize with the provisions of CBD, which respects ethics and equity in knowledge sharing and community conservation. There is a fundamental gap in terms of interpretation when the developing countries expect that the IPR on genetic resources is perpetual. However, due to lack of industrial capacity the holders of genetic resources and traditional knowledge for their use cannot themselves enter into a competitive production and commerce arena. They have to build partnerships even as to siphon part of the commercial profits accrued from the use of the GR and TK. Therefore, a particular area of collaboration could be the joint development of industry standards for bioprospecting, in which technology transfer is in-built into the technology transfer licenses as a condition of access to genetic resources and benefit sharing.

Trademarks and Geographical Indications

Each trade partner must agree to protect well-known marks of the other country, as a principle of fair trade. Building on this principle coupled with the provision of Most Favoured Nation under the TRIPs, all WTO members must protect the well-known marks of others. A failure to record an assignment should not result in loss of ownership rights in a trademark. Similarly, the principle of ‘first in time, first in right’ priority should be applied when resolving conflicts between geographical indications and trademarks. Geographical Indications should not be permitted to preclude pre-existing trademark rights. Cooperation should be expected from trade partners in getting some select, premium products of developing countries covered under GIs in the special class of GIs.

Domain Names on the Internet

In order to promote agri-enterprise based extension in the agriculture field, each party should agree to prohibit and provide sanctions against cyber squatting. Each partner’s National/Network Information Centers (NICs), the affiliated organizations and the parties operating under contract with them, should make public the complete lists of the domain names in a computer searchable database format.

Requirements Related to Counterfeiting and Border Measures

Further to TRIPs provisions on enforcement of IPRs, the trade agreements should incorporate explicit provisions to implement such requirements. The IPR-related provisions under the Customs Act,^{25,26} should be highlighted for confidence building.

²⁴M.S. Swaminathan, “Perspective: Global Agriculture-Facing the Challenges”, *New Agriculturist*, available at: <http://www.new-ag.info/01-5/perspect.html>.

²⁵S. Kochhar, “Institutions and Capacity Building for the Evolution of Intellectual Property Rights Regime in India”, 13(3) *Journal of Intellectual Property Rights*, 2004, pp. 239–244.

²⁶Spink, John, “The Challenge of Intellectual Property Enforcement for Agriculture Technology Transfers, Additives, Raw Materials, and Finished Goods Against Product Fraud and Counterfeitors”, 16(2) *Journal of Intellectual Property Rights*, 2011, pp. 183–193.

5 Perspective

IP management in agriculture is heavily context-specific. It is also dependent on the IP management policy environment broadly. Key factors affecting the policy environment at various levels include, (i) Relevant constitutional provisions, directive principles of State policy, acts and rules in effect, regulatory and administrative procedures and practices, codes of conduct, best practices, familiarity criteria, socio-economic setting, customs, customary laws, benefit of doubt consideration, etc.; at the national level, (ii) Regional institution and/ or laws, regional bodies and/or agreements, plurilateral platforms, events of conflict of interest, etc.; at the regional level, (iii) Agreements, conventions, treaties, undertakings, multi-lateral platforms, international law, United Nations mechanisms and instruments, etc.; at the international level and (iv) Natural law, environment, climates, evolution, diversity, fitness, etc., at the global level.

The freedom in decision making on transactions related to trade in proprietary goods and services, and other business transactions in IPR-enabled (patented/PVP entitled) inventions, works, and other innovations, like licenses and contracts, assignment deeds, material transfer and benefit sharing agreements, etc., would depend upon the relative ease of execution and confidence in the enforcement of business transactions in the national IPR regime of concerned country. Overall, an efficient national innovation policy in agriculture sector may also include directing the public funds towards fostering product development partnerships preceded by appropriate research collaborations. Local entrepreneurship may be supported by the development of indigenous products particularly by the local, small and medium enterprises. Similar support may be provided to business incubatees and spin-out companies. A favourable policy may be made available for foreign direct investment (FDI) to attract foreign expertise, resources and knowledge, and to enhance prospects of more job creation.

A well-thought of legislative environment has been provided in many WTO member countries, which could at least provide a cross-learning experience to move in the direction of a more harmonious interpretation of the TRIPs *vis-a-vis* uniform implantation of patenting in agricultural field. In USA, the Stevenson-Wydler Technology Innovation Act of 1980 was passed to regulate technology transfer obligations of the USDA-ARS. Further, Bayh-Dole Act, 1980 was brought in to bring university research on the same ground. With the passage of the Bayh-Dole Act, a uniform policy was implemented for the first time to provide the contractor with the opportunity to elect to retain title to inventions. Of course, the government has march-in rights and may retain a non-exclusive license for its own purposes. In the European Union, there is a concern that different national laws regarding the ownership and exploitation of IP from public research organizations (PROs), especially at universities, may create barriers to international collaborative research. Austria, Denmark, Germany Norway, Belgium and Finland have their legislation to grant universities title to IP resulting from externally funded research. In Japan and Korea, there are reforms in funding regulations to this effect. Thailand also has its

own law. A bill to this effect was placed in South Africa as well. These policy trends echo the landmark US Bayh-Dole Act. Some salient observations include that either there is employer–employee law defining ownership (Germany, Austria), or there is just common law/case law/individual agreements (USA) or there is some regulation in the patent law defining rights of the employee (UK, France).

And, then there are research sponsorship agreements (do not affect employer–employee relation but define ownership and exploitation framework in projects funded with certain public funds). At the Europe level (research framework programmes) such sponsorship agreements can become extremely complex as these are generally consortium deals involving numerous partners. Brazil has also shown intent to allow private funding in public sector research, which, of course will have to be similarly regulated under the law.

In India, several public organizations and universities have their written policy and guideline documents.²⁷ Further, a bill was introduced in the Upper House of Parliament (Rajya Sabha), entitled, ‘The Protection and Utilization of Public Funded Intellectual Property Bill, 2008’, which has been further examined by the concerned Standing Committee of Parliament. The proposed legislative instrument will obligate every researcher, grantee of the public funds for research, to inform the IP generated from such grant within a specific time period to the recipient institution, which in turn will disclose this information to the funding agency in a time bound manner. The institution will institute an IP committee to manage the IP for its protection and commercialization. The institution will inform the government funding agency about the designated countries in which it intends to seek protection of the IP disclosed, and the government will have the right to apply for IPR protection in all other countries. The bill provides that no researcher can publish or publicly disclose IP till an application for its protection has been filed. The ‘march-in’ rights will allow the government to take over an IP or patent in public interest or in the interest of ‘national security’.

The IPR-savvy countries have developed a compatible mindset since the early days, dating back to the mediaeval period. On the other hand, a transitory period of merely a decade provided under the TRIPs for the developing countries to set their respective houses in harmony with the Agreement is indeed too short. The developed countries are better organized in terms of their IP management as well as marketing, and also for documentation, execution of licenses and contracts, and litigation, etc. On the other hand, the developing countries including India tended to be more protective and conservative in the learning process. For example, it still needs to be understood by the players in seed industry (potential licensees) and public research institutions (entitled plant breeders) in these countries that a legitimate acquisition of protected varieties could raise the asset value of a seed company, giving strength to its overall business. Secondly, their availability in the

²⁷“ICAR Guidelines for Intellectual Property Management and Technology Transfer/Commercialization”, 2006, available at: <http://www.icar.org.in/files/reports/other-reports/icar-ipmitcguide.pdf>.

variety profile of company's own assets can reduce costs of PVP, including the determination of Distinctness, Uniformity and Stability (DUS) parameters of their new varieties.

As transgenics are likely to enter in the agriculture mainstream in more and more numbers and kinds over the time, and these are likely to compete as routine new varieties/Essentially Derived Varieties (EDV) in the market, a legitimate availability of their initial varieties, including the extant varieties having many desirable traits and local adaptability, with a seed company would be worthwhile in furthering relevant negotiations and transactions, including in developing international business relationships. Mere acquisitions and mergers could be futile exercises for enterprises dealing with live forms and parts thereof unless these are based on their strengths in genetic resources and/or technological capability.

The globalization process has thrown open opportunities for active contribution of agricultural scientists and technologists in the areas of research, education and extension. Agricultural research has so far been carried out through the public support. In future, public–private partnerships for carrying out research in the areas of mutual convenience, however, will become more and more relevant and important. Reasonable infrastructure and laboratories for conducting research on biotechnology as available in the public sector can be utilized by the private sector with suitable agreements or collaborative arrangements. Mutually supported testing of materials and popularization of technologies could be rewarding. The linkage between the public research and the private industrial sectors may help in strengthening production/export of the export-oriented products. Feedback from experiences of the exporters will become increasingly important for researchers. Due and pragmatic response needs to be made for any offer of investment in public sector agricultural research by the private sector particularly the multinationals; while taking due note of specific concerns of developing countries, which could be interpreted from their legislative, regulatory and administrative instruments. Nevertheless, the ultimate goal is to attain further growth in food and agriculture in countries and continents through enhanced R&D; with assured government support as well as private investment.

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Chapter 16

The Impact of Liberalization on Higher Education and Domestic Regulation

Tham Siew Yean, Nik Ahmad Kamal Nik Mahmud and Rokiah Alavi

1 Introduction

Tertiary education provided by private higher learning institutions (PHEIs) is one of the sectors that have been included in trade liberalization negotiations. In theory, trade liberalization would expand trade and mutually benefit trading partners by enabling access to new markets, improving transparency in domestic regulations, and ensuring that all trading partners are treated equally without discrimination.¹ In the existing GATS agreement, 49 countries (the European Union is counted as one country) have made a commitment in the education sector, and 40 of these countries have made a commitment to liberalize access to the higher education sub-sector. All the key exporters of higher education services, i.e., Australia, Canada, EU, New Zealand, and the USA have made commitments in the higher education services. However, the “new comers” in tertiary education exports such as Hong Kong, Korea, Malaysia, Singapore, Qatar, UAE, and India have not offered the sector under the GATS. Among the key importers of higher education services in Asia that have made commitment in the sector in the GATS are China, Chinese Taipei, and Thailand.

¹S. Bashir, “Trends in International Trade in Higher Education: Implications and Options for Developing Countries”, *Education Working Paper Series No.6*, World Bank, Washington DC, 2007, at 52.

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Free Trade Agreements (FTAs) are gaining increasing popularity as trade policy instruments, especially in East Asia. The number of concluded FTAs in Asia as a group increased from only 3 in 2000 to 54 in 2009, while 40 of these agreements are currently in effect.² Another 78 FTAs are currently under negotiations or proposed. Bilateral FTAs comprise 74% of the concluded FTAs while the remainder agreements are plurilateral in nature. Hence it is likely that FTAs in Asia will continue to proliferate and dominate the governance of international trade. At the regional level, the Association of Southeast Asian countries (ASEAN) is emerging as the hub for Asian FTAs. Malaysia has concluded and signed three bilateral Free Trade Agreements (FTAs) with Japan (MJEPA), Pakistan (MPCEPA), and New Zealand (MNZFTA). At the regional level, Malaysia and its ASEAN partners concluded five FTAs under ASEAN with China (ACTIS), Korea (AKFTA), Japan (AJFTA), India (AIFTA), and Australia/New Zealand (AANZFTA). ASEAN itself has a Framework Agreement in Services (AFAS) that has so far concluded eight packages of commitments. It is expected that regional and bilateral trade agreements will play the key roles in trade liberalization and increasing market access for the near future, particularly since the stalled World Trade Organization (WTO) Doha Round does not seem to be heading toward a significant conclusion.

Equally relevant development in GATS that would affect the future of higher education is the negotiations on domestic regulation and norms that is taking place in the Doha Round. In the Uruguay Round, member countries did not reach a consensus in some areas in services agreement. These include Domestic Regulations (Article VI) and Norms (Article X, XIII, and XV). Hence, members were called to develop disciplines on domestic regulations in the Hong Kong Ministerial meeting in 2005. The proposed domestic regulation disciplines cover measures related to qualification requirements and procedures, technical standards, and licensing requirements.³ It is useful to note that negotiation on domestic regulation and norms are not negotiated sector by sector, and therefore the outcome of this negotiation would affect all services sector indiscriminately.⁴

This chapter focuses on three main aspects of the impact of liberalization of higher education services within the context of private providers. First, it will assess the impact of trade agreements on the Malaysian market and domestic private education providers. Second, it will assess the impact on Malaysian private education exporters in terms of market access in partner countries. Finally, the potential impact of the Draft on Disciplines on Domestic Regulations that are being negotiated in the GATS on the Malaysian domestic regulations in the higher education will be evaluated. Policy suggestions to improve the competitiveness, awareness, and equity balance are deliberated at the end of this chapter.

²M. Kawai, and G. Wignaraja, “Asian FTAs: Trends and Challenges”, *Asian Development Bank Institute*, Working Paper No. 144, 2009.

³“Note on GATS Domestic Regulation Disciplines and Education Services”, 2006, available at: <http://old.ei-ie.org/gats>.

⁴“The Other GATS Negotiations: Domestic Regulation and Norm”, 2008, available at: <http://globalhighered.wordpress.com>.

2 Some Background on Services Trade Negotiation

This section intends to provide a brief explanation on the services trade negotiations. Unlike trade in goods, trade in services occurs not only through the cross-border movement of the service, but through the movement of persons (consumers and individual service providers) and foreign investment.⁵ In the services negotiations, the WTO has identified four modes of supply, i.e., (i) cross-border supply, (ii) consumption abroad, (iii) commercial presence, and (iv) presence of natural persons. These modes are explained in Table 1.

GATS excludes services that are offered by government authority that are provided on non-commercial basis. For any service sectors and for each mode of supply, each country has option either to offer full liberalization or decline to make a commitment to liberalize. In GATS terminology, the former is called “none” while the later is known as “unbound.” Members are also allowed to make a partial commitment with specific limitations, and these limitations must be specifically inscribed in its schedule of commitments.

3 Impact on the Malaysian Market and Domestic Private Providers

Analysis on the impact of education services liberalization will be done based on the modes of supply. In the case of Mode 1, Malaysia has unbound higher education services for both market access and national treatment. Malaysia has listed two limitations for market access. The first limitation is franchise and twinning arrangements between foreign-based institutions and Malaysia based educational institutions (this was mentioned in the MJEPA and ASEAN–China TIS) and the second is the requirement of commercial presence. These limitations have significant implications on foreign online and distance education provision in Malaysia. Fink and Molinuevo have noted that cross-border supply of services, by definition, cannot take the form of commercial presence.⁶ Therefore, the requirement for commercial presence may be interpreted to be tantamount to a full prohibition of the provision of Mode 1 services in Malaysia.⁷

For Mode 2, the earlier limitations inscribed in the GATS revised offers for market access, has been removed in subsequent FTA agreements. For example, in the latest agreement signed in October 2009, (the MNZFTA), there are no

⁵Basir, *supra* note 1.

⁶WTO defined Mode 1 as services received from abroad through the telecommunications or postal infrastructure of a country since the service supplier is not present within the territory of the Member where the service is delivered.

⁷C. Fink and Molinuevo, “East Asian Preferential Trade Agreements in Services: Liberalization Content and WTO Rules”, 7(4) *World Trade Review*, 2008, pp. 641–673.

Table 1 Modes of supply

Supplier presence	Other criteria	Mode	Example
Service supplier not present within the territory of the member	Service delivered within the territory of the member, from the territory of another member	Cross-border supply (Mode 1)	Distance education
	Service delivered outside the territory of the member, in the territory of another member, to service consumer of the member	Consumption abroad (Mode 2)	Students travelling to another country to enroll in a program for a course of study/degree program
Service supplier present within the territory of the member	Service delivered within the territory of the member, through the commercial presence of the supplier	Commercial presence (Mode 3)	Local university or satellite campuses
	Service delivered within the territory of the member, with supplier present as a natural person	Presence of natural persons (Mode 4)	Lecturers/researchers travelling temporarily abroad to teach or to conduct research

Source Adapted from WTO Trade in Services, Basic Documents, 2008

limitations inscribed at all. This is reflective of the actual situation on the ground as there are no legal restrictions restraining the movement of students to study abroad. It is important to note that the outflows of students from Malaysia are not influenced by FTA agreements as in practice; there are no restrictions on outflows. For example, New Zealand reported a 70% increase in the number of Malaysian students studying in New Zealand from 2003 to 2008 despite the fact that there was no FTA then with New Zealand. This occurred during a period when there was an overall decline in the number of international students studying in NZ. Actual diversions from outflows will depend on cost considerations, the availability of transnational programs locally and types of branch campuses available domestically as well as government policies on sending sponsored students overseas.

In Mode 3, for market access, the main limitations are equity constraints, economic needs test and specific types of courses preferred. Foreign equity is restricted to 49% in all the agreements, except for MPFTA, ANNZFTA, and the MNZFTA with the highest percentage offered in the MNZFTA (70% by 2015). However, more than 49% foreign equity is also listed as possible for specific courses in the revised offers for the GATS, MJEPA, and the ACTIS. It is mainly unbound for national treatment, especially for grants and subsidies.

The impact of the FTAs is expected to be greatest in Mode 3. However, it is unlikely that these FTAs by themselves will induce a large influx from foreign universities to establish branch campuses in Malaysia for the following reasons: domestic practices and domestic competition; and global competition for branch campuses. Current domestic practice requires foreign institutions to be invited before they can be established in Malaysia. It is likely that the continued use of this

practice will limit the entry of branch campuses. At the same time, there are already a substantial number of private players (454 as at 2009) in the market and domestic competition is already quite intense for both domestic and international students. There is also intense global competition for branch campuses from other host economies. An increasing number of international higher education hubs have emerged in the past decade, particularly in the Middle East and Asia.⁸ There are five hubs in the UAE alone, where a large number of branch campuses are located. Hubs in Asia include Singapore, Malaysia while South Korea has recently joined the race for education hubs in the Incheon Free Economic Zone. Australia that is a leading exporter of higher education is also building a hub in South Australia, called “University City.” Intense competition for building hubs is reflected in the race to offer favorable conditions for attracting foreign branch campuses. Dubai International City (DIAC) has been reported to offer foreign campuses 100% foreign ownership, a 100% tax exemption, and a 100% repatriation of profits although foreign campus entry is also reportedly very restrictive, aiming at the prestigious universities and to push out the earlier entry of less prominent higher education institutions.⁹ Similarly, South Korea has been reported to offer rent-free campus building and seed money to lure foreign investors to Incheon in the hope of building world-class research and academic institutions.¹⁰

UAE is the leading host economy for branch campuses with 40 international branch campuses in the country or 25% of all the international branch campuses in the world.¹¹ China is in the second position, hosting 15 campuses or 9% of all existing campuses, followed by Singapore (12 campuses or 7% of the world total). Canada hosts six operations while Malaysia and the UK reportedly host five operations each as at 2009. Analysis on the transnational hubs in the Gulf indicates the need for international students to sustain and develop these hubs as the local demand is limited by their population size.¹² Notably, participating institutions will need to attract students not just from the Gulf region itself alone, but also from the entire Middle Eastern market and beyond.

This implies increasing competition for an already intensely competitive global market for international students. OBHE analysis in 2009 on the market share of the major and minor players for international students from 2007 to 2009 reveals some

⁸R.F.J. Becker, “International Branch Campuses: Markets and Strategies”, *The Observatory on Borderless Higher Education (OBHE) Report*, 2009, at 14.

⁹*Id.*, at 15.

¹⁰D. Mcneill, “South Korea seeks a New Role as a Higher Education Hub”, *The Chronicle of Higher Education*, 2008, available at: <http://chronicle.com/weekly/v54/i28/28a00104.htm> [accessed on December 30, 2009]; Several American universities have reportedly either signed or considering signing agreements to set up degree programs and research projects there.

¹¹Becker, *Supra* note 8, at 7.

¹²Observatory on Borderless Higher Education (OBHE) 2007, January 16. Breaking news article —A fifth transnational hub for the Gulf: Bahrain announces plans to create a Higher Education City and Trends, 2007.

interesting shifts.¹³ The market share of major players, namely the USA, the UK, and Australia, has dropped slightly from 45 to 44% of the world's overseas students. China that was an emerging player in 2007 has now joined the league of the "middle powers" in this market, although its market share remains at 7%. In contrast, the share of Germany and France (the other two players in this group), have experienced a drop in their respective shares from 10% each to 9% each. The evolving destinations, comprising Canada, Japan, and New Zealand have also experienced a drop in their respective market share of 5, 5 and 3% to 4, 4 and 2% for the same duration. Singapore and Malaysia, classified as emerging contenders, have maintained to retain their respective market shares at 2% each. South Korea has joined the group of emerging contenders in 2009 with a market share of 1.5%.

Due to the above reasons, the establishment of branch campuses will more likely be influenced by the package of incentives offered¹⁴ and the demand of international students to study in Malaysia. Of all the partner countries in Malaysia's FTAs that are exporters of higher education, New Zealand and Japan are not in the list of institutions with international branch campuses compiled by OBHE 2009.¹⁵

Although Japanese universities are reported to be taking their programs abroad, especially with other Asian universities, they seem to focus on joint programs; joint degrees with partners that share the same high academic standards, while establishing branch campuses are apparently lower in priority.¹⁶

It is possible that one of NZ's higher education institutions may wish to access the MNZFTA commitments to establish a branch campus in Malaysia as this sector is one of their export strengths and it is also their major offensive interest in their negotiations with Malaysia. OBHE 2005 observed that NZ appears to have focused on onshore provision for international students and there are limited NZ programs offered outside the country. Establishing branch campuses may be a possible strategy to increase their market presence in the region and to increase their global market share for international students.

Commitments in Mode 4 are mainly unbound, except as indicated in the horizontal commitments for market access and national treatment, except in the case of the AKFTA, AANZFTA, and the MNZFTA. The latter three agreements have placed a cap on the number of lecturers and experts who can be brought in. In the case of Mode 4, providing institutions rely to a varying degree on home and local staff at their branch campuses.¹⁷ It would appear that the number of international

¹³V. Lasanowski, "International Student Mobility: Status Report 2009", *The Observatory on Borderless Higher Education (OBHE) Report*, June, 2007.

¹⁴Rumbley and Altbach have indicated that financial incentives seem to spur international branch campuses activities in particular countries/regions, 2007.

¹⁵Japan, however, was reported in another OBHE article, to have five Japanese offshore study abroad campuses in 2005, with three in the USA, one in the UK and one in New Zealand, *OBHE*, April, 2009.

¹⁶Based on informal discussions with colleagues from Waseda University, one of the leading universities in international cooperation.

¹⁷Becker, *Supra* note 8, at 17.

academic staff will depend on the home institutions' employment plan as well as the availability of local academic staff that meets the standards required by the home institution for its branch campus. Since it is institution-specific and there are no general trends, it is difficult to conclude as to whether the impact of the limitations may be positive or negative.

4 Impact on Malaysian Private Education Exporters

The impact of bilateral and regional free trade agreements on the commitments in Mode 1 would be interesting to observe because the number of countries that have fully liberalized their market access for Mode 1 has increased from 3 to 9. Cambodia is the most liberal country that has given full commitments in all the agreements for both market access and national treatment. Five out of nine Malaysia's trade partner countries in ASEAN have made full commitments for this sector under the 7th package of AFAS. Vietnam, Philippines, and China did not bind higher education services for this mode. Indonesia and Myanmar made commitments only in AFAS and AANZFTA, thus opening the sector only for ASEAN countries, Australia, and New Zealand. Lao PDR has fully liberalized the sector for ASEAN countries and Korea, while Thailand's offer is only for the ASEAN countries. China did not commit the sector under the ASEAN–China Agreement, and its commitment under the GATS agreement is unbound. New Zealand, Australia, Japan, and Pakistan offered full market access and national treatment for this mode. It is unbound for Korea.

Malaysian PHEIs should have better opportunity to enter the markets of trading partner countries that have fully liberalized online education services, especially in the ASEAN countries and Pakistan. ASEAN countries that have fully liberalized this mode of supply are Cambodia, Indonesia, Lao PDR, Myanmar, and Thailand. Nevertheless, market access is only one of the many factors that need to be considered by PHEIs in their decision to establish overseas learning centers. Important elements determining successful implementation of an e-learning programme include programme content, web page accessibility, learners' participation and involvement, website security and support, institution commitment, interactive learning environment, instructor competency, and presentation and design.

In addition, availability and access to ICT and ICT-related infrastructure and services in the host country are also equally pertinent. In this aspect, challenges appear to be significant in ASEAN countries and Pakistan that have offered full liberalization of Mode 1 of higher education services. The internet penetration ratio in Lao PDR is very low at only 1.9% of the total population in 2007¹⁸ while the ratio is much lower for Cambodia (0.5%) and Myanmar (0.2%). The internet penetration ratio is also relatively low for Pakistan (10.6%), Indonesia (12.5%), and Thailand (24.4%).

¹⁸Internet World Statistics, 2009, available at: www.internetworldstats.com.

In the case of Mode 2, all ASEAN members, except Singapore and Brunei, and all the bilateral trade partners have fully liberalized this sector (except Korea for national treatment). Analysis on the origin of international students in Malaysia shows that free trade agreements do not seem to have much impact on the inflows of international students to study in Malaysia. However, considerable increase in international student inflows, in fact, is registered from countries that do not have formal trade agreements with Malaysia. It could be inferred here that the government-to-government bilateral relations, especially with certain Muslim countries and Central Asian countries, have a greater impact in attracting foreign students to Malaysia.

As for Mode 3, only New Zealand, Japan, and Cambodia have offered full liberalization in both market access and national treatment. Vietnam, Laos, and Australia gave full commitments in market access. Pakistan offered full liberalization on both market access and national treatment, but put a cap of 60% on foreign equity ownership. Philippines offered full liberalization in national treatment, but with the condition that only Philippines' citizens are allowed in the administration and control of educational institutions. Countries that have their national treatment unbound under Mode 3 are Laos, Indonesia,

Australia, China, Myanmar, and Korea. Thailand left unbound both market access and national treatment. However, PHEIs establishment of international branches in foreign countries highly relies on demand for the education services provided by particular higher learning institutions as well as the regulatory requirements in the host countries. New Zealand, for example, is one of the most liberal countries in terms of its commitments in higher education services. However, this does not necessarily mean that Malaysian PHEIs can easily enter New Zealand's higher education market. In general, we can say that market access provisions by trading partners do not necessarily mean that Malaysian outbound PHEIs have greater opportunity to establish branches overseas.

Commitments in Mode 4 did not improve much with FTAs. Most countries kept it unbound, except as indicated in horizontal commitments. The only country that has made full commitments for Mode 4 is Japan in the bilateral MJCEPA. It is a GATS-Plus commitment for Japan (unbound in GATS). The hiring policy in branch campuses would usually depend on the employment guidelines, qualification and working experience requirements, costing, visa, and working permit red-tape and staff development programs in the host institution. The implication of having this mode unbound is that it may cause uncertainties and impose limitations to Malaysian private education services providers in establishing branch campuses in the host country.

5 Potential Impact on Domestic Regulations

As mentioned earlier, pursuant to Article VI: 4 of the GATS, members have agreed to the draft disciplines on domestic regulation. The Draft on Disciplines on Domestic Regulations (DDDR) have laid down basic requirements for domestic regulations for the purpose of facilitating "trade in services by ensuring that

measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are based on objective and transparent criteria” (emphasis added). This section intends to analyze the extent to which domestic regulations governing tertiary education in Malaysia are consistent with the Draft on Disciplines on Domestic Regulations.

In the course of regulating private higher education institutions (PHEI) in Malaysia, statutes are passed for this purpose and the main statute is the Private Higher Educational Institutions Act 1996 (Act 555). The Act was last amended in 2006. The long title of the Act states that it is “an Act to provide for the establishment, registration, management and supervision of, and the control of the quality of education provided by, private higher educational institutions and for matters connected therewith.” Act 555 contains provisions that are meant to regulate the establishment and operation of PHEIs in Malaysia. The Act does not distinguish between local and international PHEIs, thus, as far as the Act is concerned, both types of institutions are being treated equally.

There are two types of PHEIs regulated by the Act, namely, application under section 6 of Act 555 to the Registrar General (RG) for the establishment of a PHEI without the status of University/University College/branch campus; and under section 22 of Act 555 where the Minister may invite any proposed applicant to establish a PHEI with the status of a University/University College/branch campus.

In the case of establishment and registration of a PHEI without the status of a university/university college/branch campus or a branch of the institution, sections 6 et al. gives the Minister of Higher Education (MOHE) the power to approve registration of a PHEI upon the recommendation of the Registrar General (RG) of the Ministry of Higher Education. The fee is RM100. Application has to be submitted in accordance with section 18. Application for approval to establish a PHEI with the status of a university/university college/branch campus is subject to the invitation of the Minister under section 22. The detailed procedures are laid down in the Private Higher Educational Institutions (Establishment) Regulations 1997 that include; applicant has appropriate experience; has ability to provide qualified and experienced teachers; strong financial provisions, etc.

In the light of the DDDR, the licensing requirements under Act 555 and its establishment regulations have fulfilled the criteria of objectivity and transparency as for application to establish PHEI without the status of University, etc. However, application to establish University/University College, etc., is subject to ministerial invitation and the criteria as used by the Minister are neither in the Act nor in the Regulations. This may be a subject matter of contention as far as DDDR is concerned.

The ministerial power to make invitation under section 22 may not also be consistent with WTO Framework Agreement on Services, Part II that sets out general obligations and disciplines. A basic Most-Favored-Nation (MFN) obligation states that each party “shall accord immediately and unconditionally to services and service providers of any other Party, treatment no less favorable than that it accords to like services and service providers of any other country. The decision to invite a particular PHEI pursuant to the section will be contrary to the MFN provision to treat all service

providers equally without favoring a particular one. However, the MFN provision also allows for exemptions on condition that such exemptions must include reviews after 5 years and a normal limitation of 10 years on their duration.

At the end of the day, it is the Minister who decides whether a PHEI should be established or otherwise (section 10). However, Ministerial discretion is exercised in accordance with section 11, which states among others that the Minister shall not approve an establishment of a PHEI unless he is satisfied that the applicant is capable to provide enough facilities; capable to provide efficient management; or has taken adequate measures to establish a proper system of governance and others. However, he is under no duty to give reason and this is consistent with the principles of objectivity and transparency emphasized by the WTO.

On the other hand, the words in section 11 are too general and may be subject to many interpretations, thus causing these terms to be placed on a subjectivity scale. For instance, words such as “adequate educational facilities for the establishment of the private higher educational institution;” and “the applicant is capable of providing adequate and efficient management and administration for the proper conduct of the private higher educational institution” requires standard objective criteria in order to be used as a fair instrument of evaluation. These criteria may already be in existence but there is a need to make it available for public viewing.

All these involve administrative decision-making and under Malaysian law, this is subject to review by the courts. Thus, a measure of objectivity and abuse of discretion is well controlled under strict judicial principles. On the other hand, WTO requires that domestic regulations should establish the means for prompt reviews of administrative decisions relating to the supply of services. Since judicial review process goes through tedious procedural stages and a lengthy legal process, it may not satisfy the “prompt reviews of administrative decisions” as envisaged by the WTO.

Section 12 requires a PHEI whose establishment has been approved, to incorporate a company under the Companies Act of Malaysia with a paid up capital of not less than RM200,000. The Cabinet may impose certain equity shareholding for bumiputra/non-bumiputra as it deems necessary. This may create inconsistency of condition and run contrary to the spirit of transparency and objectivity under the DDDR. Once an establishment is approved by MOHE, the PHEI must apply to register the institution and this is governed by the Private Higher Educational Institutions (Registration) Regulations 1997.

There are provisions in the Act that allow appeal against the various decisions of the Minister and the RG such as against the RG’s refusal to issue registration certificate; and cancellation of registration certificate and revocation of permit to teach. There is no appeal provision for refusal to approve an establishment of a PHEI. This runs contrary to the requirement of “transparency” in DDDR, paragraph 13(h) that the detailed measures shall include information on “procedures relating to appeals or reviews of applications.” It is arguable that review process is available under the normal judicial review process (as stated above), but the absence of express provision for appeal and review could be a source of contention.

The DDDR further requires that stakeholders shall be adequately informed on any changes to policy and rules and “to provide reasonable opportunities for service suppliers to comment on such proposed measures” (Article 15). Other transparency requirements include, Article 13(g) where applicable (measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards, as well as detailed information regarding these measures); how public involvement in the licensing process, such as hearings and opportunity for comment, is provided for. In Article 13(h), if domestic law includes exception and derogation to the general rules on measures, these have to be expressly stated. For instance, if certain licensing procedure is exempted for certain type of service providers, then it has to be explained and justified.

On time frame, these are the requirements: allow submission of application at any time (Article 20); if there is specific time period for submission, allow a reasonable period for submission of application (Article 20); and processing of an application without undue delay; inform applicant that application is incomplete within a reasonable period of time and normal time frame for processing of application.

The Malaysian Qualification Agency Act, 2007 (MQA) regulates and accredits all academic programs conducted in Malaysia. Therefore, PHEIs that are offering academic programs in Malaysia is required to fulfill the terms and conditions as laid down by the Act. Even though the MQA Act does not make accreditation mandatory, but market forces will determine the acceptability of an academic program on the basis of accreditation. As it is difficult to regulate distance-learning program, there is no provision in Act 555 and under any law in Malaysia for the registration of distance learning provider.

5.1 Fulfillment of Objective and Transparency Requirements Under the DDDR

Prescribed requirements for consideration of application as stated in paragraph 9 of the Private Higher Educational Institutions (Establishment) Regulations 1997 are:

- (i) Notice of rejection will be issued in writing to the applicant.
- (ii) Under section 17, Registrar may request for particulars from such company and in accordance with paragraph 8 of the 1997 Regulations, the particulars requested for shall be submitted within 21 days from receipt of request.
- (iii) There is no mention in both Act and Regulations on the time period of application as well as the duration for processing of application. It means that applications can be made at any time but the time frame of decision to be made is uncertain. This aspect may not be consistent with the WTO standards that require clear time frames to be given to process an application.
- (iv) The requirement to incorporate a company prior to registration is fairly normal to ensure financial accountability of a PHEI.

- (a) Registration Requirements
 - (i) The Private Higher Educational Institutions (Registration) Regulations 1997 provides for the procedures of registration for PHEI that has been accorded permission to establish an institution under Act 555.
 - (ii) There is nothing in the requirements that can be considered prejudicial or discriminatory in nature as these are consistent with what has been guided by the WTO standards.
- (b) Conditions on fee structure
 - (i) Fee structure in any PHEI has to be approved by the RG in writing in accordance with paragraph 8. A copy of fee structure is to be exhibited at a conspicuous place in the PHEI premises.
 - (ii) This requirement is to control the fee structure at all PHEI and to ensure a reasonable fee is charged to students. It is also to ensure that no undercutting is practiced by PHEI and that will ensure fair and healthy competition. However, it may run contrary to WTO basic principle of free competition of services.
- (c) Revocation and Termination

Power to revoke an approval to establish a PHEI and power to cancel a registration of a PHEI are provided in sections 54–57. There is also power of the Minister to close down a PHEI under section 58–60 of Act 555. The criteria for these actions are clearly laid down in the sections, namely: Ministerial action seems reasonable in light of above-mentioned criteria but the following criteria may open to objection namely, any other reason deemed appropriate by the Minister. This “reason” is not determined and thus may open to decision which may be based on unreasonable ground. Secondly, the power to cancel a license includes failure to maintain discipline in the PHEI. However, the word “discipline” is not defined and needs to be defined.

- (d) The use of National Language in Act, 555
 - (i) Section 41 provides that PHEI shall conduct its program in the National Language (NL) but the Minister may allow on request to conduct programs in any other language. In this case, NL shall be taught as a compulsory subject. However, this requirement is not applicable to foreign students and also exemption can be given for Malaysian citizens who have passed similar subject before. Under section 42, the Minister may direct PHEI to use the NL in a particular course of study for Malaysian citizens. This requirement does not apply to others. Minister may impose condition to PHEI to give effect to this provision.
 - (ii) Sections 41 and 42 do not impose unfavorable conditions on foreign students; as such, these provisions are acceptable vis-à-vis the principle of liberalization under the WTO. The requirement to introduce BM to Malaysian students is expressly stated in these sections; thus it has fulfilled the requirement of transparency as required by the DDDR.
 - (iii) Under section 43 the RG shall determine compulsory subjects to be taught by PHEI.

The requirements to be imposed (compulsory subjects) are to be determined by the RG and it is not stated in the Act. This may be a cause for concern as it is not made known to the prospective service provider.

(e) Permit to Teach

- (i) Under section 51 Permit to Teach (PT) is necessary before a person is allowed to teach in a PHEI. The RG has the power to issue such permit. PT specifies the subject to teach and if there is any refusal to issue PT; appeal may be made to the Minister. Section 52 provides basis to refuse PT or ground to revoke it namely: person has no qualification to teach; or has made a false/misleading statement in his application; not physically fit or mentally fit; convicted of an offence of fraud, dishonesty/moral turpitude; corruption; or any punishment of 2 years imprisonment or more. An additional ground is for acting in a manner prejudicial/detrimental to the interest of Malaysia, and the public/student. Also, RG has a duty to give notice and to state the reason for refusal or revocation. The person may appeal to Minister within 21 days from the date of refusal or revocation.
- (ii) There are clear and objective requirements for issuance, revocation or refusal of PT under the Act. The right to be heard is fairly comprehensive where there is a right to make representation to RG. The additional ground to revoke, i.e., on the ground for acting in a manner prejudicial/detrimental to Malaysia is wide and subjective and giving wide discretionary power to RG. It may be inconsistent with DDDR on transparency and objectivity tests. There is a need to review this ground. There should also be transparent guidelines on how the grounds to refuse/revoke a PT are verified.

6 Policy Suggestions

There are no published studies on the utilization of FTA to access markets in the service sector. However, the Asian Development Bank Institute (ADBI) funded a survey in 2007/08 on the utilization of these agreements to access FTA preferences in the firm level in Japan, Korea, Philippines, Singapore, and Thailand. The study found low utilization rates as out of the 609 East Asian firms surveyed, only 22% have used FTA preferences. The most significant reason for non-use of preferences was found to be a lack of information on FTAs. Malaysian PHEIs need to increase their knowledge and understanding of FTAs if they are to utilize these agreements in their expansion plans. We suggest that regular workshops and seminars to be conducted to educate the PHEIs on these FTAs and their implications.

Since there is intense global competition for international students with most of the major exporting countries fully liberalizing their Mode 2 commitments in GATS as well as the regional and bilateral FTAs, attracting more students will require enhancing “pull” factors that attract international students. These in general

include quality assurance and recognition, employment support after graduation, visa issues, cost considerations, including strength of the local currency, and host country climate (whether the students feel comfortable and welcomed in host country).

A survey of the international students' problems in studying in Malaysia will indicate the country-specific issues that need to be overcome in order to increase the attractiveness of Malaysia as a host country for international students. An annual survey is recommended to see if the issues raised from the perspective of international students have been resolved over time and to identify the emergence of new issues before they become obstacles in attracting more students in the future.

To enhance the role of branch campuses in building capacity in Malaysia, selection should be based on the provision of programs that will attract both domestic and international students in line with the education hub vision of Malaysia. Programs that meet the human capital needs of the country will also meet the human capital needs of the Southeast Asian region and other developing countries that are striving to move up the innovation ladder and value chain of production. Enhance incentives or grants given for research collaboration with local researchers to encourage technology transfer. Encourage joint grants from their home country with Malaysian research grants to facilitate joint research with the mother campus as well. The criteria of visas for lecturers should also be based on research and not for teaching alone. This will encourage the mother campus to export the research staff and not the teaching staff alone.

Academic programs offered by Malaysian PHEIs overseas either through online (Mode 1) or through its offshore branches (Mode 3) must be accredited by MQA to ensure quality and credibility. There is currently no requirement for this condition in the case of Malaysian PHEIs venturing abroad.

Encourage PHEIs venturing abroad to run programs in fields of study with concluded MRAs with partner countries. For example, ASEAN has concluded MRAs in seven areas, i.e., engineering services, nursing services, architectural services, survey qualifications, medical practitioner services, dental practitioner services and accounting services. There is a close link between internationalization of higher education and the internationalization of professional services.¹⁹ Thus, more MRAs for technical and professional services are clearly needed to facilitate recruitment of professionals as education services progress over time as well as to ensure that the degrees offered by Malaysian PHEIs are accepted abroad. To achieve this, ratifying more MRAs with the help of professional bodies is necessary.

Malaysia needs to improve the market access provided by partner countries in Modes 3 and 4 in future agreements. Many current partner countries in existing agreements have placed various limitations in their commitments in these modes and this may inhibit Malaysian providers from venturing overseas.

¹⁹M. Phillips and C.W. Stahl, "Internationalisation of Education, Training and Professional Services: Trends and Issues", *Capstrans Working Paper*, 2000.

The provisions of Act 555 and subsidiary legislation under it have generally fulfilled the objectivity and transparency requirements of the DDDR but there are areas that need to be reviewed to ensure its consistency with the guidelines: Act 555 and its regulations do not state the criteria for ministerial consideration to invite a PHEI to apply to establish a university/university campus, etc. There is a need to provide clear, objective and transparent criteria for this type of licenses. The Act gives the Minister discretion to decide whether a PHEI should be registered or not and also to revoke licenses already issued. For instance, there are some criteria set out in section 11 of the Act and also grounds to revoke license that may cause uncertainty. Some of the words used and also criteria laid down are too general and may be subject to many interpretations, thus causing these terms to be placed on a subjectivity scale.

The Ministerial power to invite a PHEI to apply for license may also be contrary to the Agreement on Trade in Services on the provision related to the Most Favored Nation (MFN) status under the WTO. The DDDR requires a verification process for qualifications and criteria for licensing in the domestic regulations. This is not included in the Act or its regulations and the DDDR requires that the verification procedures are made available for public consumption.

The DDDR also requires that opportunity for comment in cases where there are new criteria introduced by the authority and this entails publication of the proposed criteria to allow service providers to give their feedback. This also applies to a situation where exceptions, derogation, or changes to licensing requirements and technical standards, and the normal time frame for processing of application are made by the licensing authority. There are appeal procedures against any decision made under the Act but there is no appeal against the decision of the Minister to refuse a license. This is contrary with the DDDR guidelines. Even though there is a review process through the civil court, this is outside the purview of the Act. Thus, appeal and review procedures will have to be very clear in the Act.

Despite the abolition of the FDI equity ownership policy, the Cabinet still has the power to impose bumiputra/non-bumiputra equity requirement and this may run contrary to the principles of transparency and objectivity as laid down by the DDDR. Even though the present domestic regulations do not require an applicant to approach more than one authority for license but permission from local authority, health authority, and fire services regulations are applicable when PHEI is going into physical development phases. Act 555 has not fixed any time period to submit an application for license. DDDR requires that processing of application shall be initiated without undue delay. The time frame for processing application is not stated in the Act or regulations and this is not consistent with the requirement under the DDDR. The DDDR requires that, "upon request, reasons for rejection of application and timeframe for appeal should be given." This is absent in Act 555 and its regulations. Changes need to be made to ensure consistency with these requirements.

In order to ensure that quality and credible educational programs are offered in Malaysia, serious consideration should be taken to regulate distance education offered by Foreign Service providers. The compulsory subjects to be imposed by

the RG are not determined in the Act thus, could be contrary to the principles of transparency and objectivity. The different treatment given to local students and international students may not be consistent with the principles of liberalization under the Trade and Services Agreement because that emphasizes that “all such measures of general application should be administered in a reasonable, objective and impartial manner.”

There are clear powers and procedures for issuance of Permit to Teach but there are grounds for decision to refuse or revoke that need to be more clearly laid down in the rules. There should be transparent and objective procedures to verify the grounds to refuse or revoke the Permit to Teach. The period of appeal needs to be reviewed in the light of other appeal period as provided by the Act.

Domestic regulations on quality are transparent and objective. The MQA Act (Act 679) is comprehensive and objective in its coverage and application. However, the MQA may impose conditions on any decision on accreditation. The criteria of conditions are not stated in the Act or its subsidiary legislation. Therefore, there is a need to be clear on conditions that may be imposed together with the certificate of accreditation. The MQA has no control on recognition of employer for programs that have been given accreditation. This is a cause for concern because the credibility of accreditation is not fully ascertained.

In the absence of an international body that provides recognition to country-based accreditation body, membership of regional and global organizations are the right strategies taken by MQA to gain international credibility. A strategic agenda on this matter needs to be in place to ensure MQA is accepted internationally. Recognition of accreditation by MQA for employment purposes has not been fully resolved and need to be resolved to be consistent with the principles of transparency and objectivity under the WTO policies. To increase recognition, more MRAs and/or recognition tools need to be developed.

Conditions imposed on licenses for geographical location, academic programs, and degrees to be awarded may be allowed provided that domestic regulations have provided clear and unreserved provisions on the power of the Minister to impose such conditions. There should also be appeal and review procedures. In the course of giving out licenses, limitation on a number of licenses should be progressively eliminated. Limitations should not also be imposed to the total value of service transactions or a total number of service operations or people employed.

Local and foreign service providers are to be treated equally. If different treatment is to be given to domestic service providers, the conditions of competition should not, as a result, be modified in favor of the domestic service providers. In the light of the abolition of the FDI guidelines on equity ownership, there should not be any other form of restrictions imposed by the Government on the matter.

7 Conclusion

Trade agreements may open market access for all including foreign providers, programs, students, and lecturers to enter Malaysia as well as for domestic providers, programs, students, and lecturers to venture out of Malaysian shores. However, these market access openings are only opportunities to enter markets, be it in Malaysia or elsewhere. In reality, there are other factors at play that can also affect market access, namely demand and domestic regulations. In terms of demand, quality assurance and recognition are important determinants of student selection of programs as these two factors ensure employability be it in Malaysia or elsewhere. These two factors will therefore determine the marketability of the programs conducted in Malaysia and Malaysian programs conducted outside the country, be it in the form of Mode 1 or Mode 3. Any market access opportunities must, therefore, be accompanied with provisions on quality assurance and recognition before these opportunities can be realized.

Other factors influencing demand include infrastructural support, hospitality of host countries toward international students, as well as opportunities for employment post graduation. In particular, adequate infrastructural support is vital for the supply of higher education programs in the form of Mode 1. Enhancing these factors will augur well in terms of attracting more international students and this, in turn, will draw foreign campuses to town, be it in Malaysia or elsewhere.

Domestic regulations play a vital role in regulating the programs, providers, students, and lecturers available in a country. GATS and free trade agreements do not prohibit domestic regulations nor do these agreements overrule the domestic requirements of a country. Instead, the Draft Discipline on Domestic Regulations (DDDR) requires the use of objective and transparent criteria in all measures that govern the higher education sector of a country. Enhancing domestic regulations in terms of objectivity and transparency will help to fulfill the requirements of the DDDR.

It will also enhance the attractiveness of Malaysia as an educational hub for transnational programs, transnational providers, and international students and staff as a well regulated higher education sector and will also increase the confidence of all stakeholders in the system. Therefore, Malaysian can only gain from the liberalization process if the market opening opportunities in FTAs are accompanied by strong commitments on quality assurance and recognition, and continuous efforts to enhance other demand-related factors as well as to align the domestic regulations of the country to the DDDR requirements on objectivity and transparency.

Chapter 17

WTO and the Regulation of International Trade Law

S.K. Verma

1 Introduction

International Trade Law has been an aggregate of legal rules of ‘international legislation’ and usages among merchants, based on bilateral relations. Modern international trade law (extending beyond bilateral treaties) began shortly after the Second World War, with the negotiation of a multilateral treaty—the International Trade Organization, as a part of Bretton Woods institutions, which was partly brought into force as the General Agreement on Tariffs and Trade (GATT) in 1947 to deal with trade in goods. The GATT had been the backbone of international trade law for the most part of the twentieth century after the II World War. The seven tariff rounds concluded under the GATT not only reduced tariffs in international trade but also gave stimulus to the growth and volume of global commerce. The GATT’s eighth round, the Uruguay Trade Negotiations (1987–1994) led to the formation of the World Trade Organization (WTO), which modified and replaced GATT, and the GATT 1947 became a part of it.

In 1994, the *Agreement Establishing the World Trade Organization*, also known as the ‘Marrakesh Agreement’ was adopted, which established the WTO. The WTO was officially commenced on January 1, 1995. The coverage of the WTO is much broader than the GATT 1947, which dealt with the trade in goods. It has four multilateral agreements, binding on the members *ipso facto*: the General Agreement on Trade in Services (GATS), Agreement on Trade-Related Intellectual Property Rights (TRIPS), Dispute Settlement Understanding (DSU), and Trade Policy Review Mechanism; and Plurilateral agreements on Public Procurement, Civil Aircraft, International Dairy Products and International Bovine Meat. Besides, various other agreements were also adopted, viz, Agreement on Agriculture, Agreement on Textiles and Clothing, Agreement on Technical Barriers to Trade,

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Agreement on Trade-Related Investment Measures. The WTO is designed to supervise and liberalize international trade.

The WTO has 158 members,¹ representing more than 97% of total world trade and 26 observers, most of them seeking membership of the WTO. The WTO members do not have to be full sovereign nation-members. Instead, they must be a customs territory with full autonomy in the conduct of their external commercial relations.²

The WTO deals with regulation of trade between participating countries; provides a framework for negotiating and formalizing trade agreements, and a dispute resolution process aimed at enforcing participants; adherence to WTO agreements. It allows ‘cross retaliation’ across sectors for effective enforcement of the obligations. It provides (a) framework for administration and implementation of agreements; (b) forum for further negotiations; (c) trade policy review mechanism and (d) promotes greater coherence among members’ economics policies.

WTO is most prominent in the area of dispute settlement in international trade law. Its dispute settlement system is ‘the most active international adjudicative mechanism in the world today’. The WTO dispute settlement body is operational since 1995 and has been very active since then with 458 cases brought before it between 1 January 1995 and 6 February 2013.³ The last case is brought by the United States against India concerning the domestic content requirements, which requires developers to use cells and modules produced in India, in its solar programme, which according to the US restricts India’s market to US imports.⁴ The WTO dispute settlement body has exclusive and compulsory jurisdiction over disputes on WTO law.⁵

2 Principles of the WTO Trading System

WTO aims at the free trade by lowering the trade barriers. In this direction, there are five basic principles of the WTO/GATT trading system:

- (i) Principle of non-discrimination [most-favoured-nation (MFN) treatment and the national treatment obligations] this has been the backbone of the multi-lateral trading system since GATT, 1947;

¹As on February 2, 2013, available at: http://www.wto.org/english/news_e/news13_e/acc_lao_08jan13_e.htm.

²John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law*, Part of Hersch Lauterpacht Memorial Lectures, (Cambridge University Press, 2009) at 109.

³Available at: http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

⁴Available at: <http://wtocentre.iift.ac.in/thematic/pdf/thematic2013/Bilateral%20and%20Regional/USA.pdf>.

⁵Article 23.1, Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the WTO Agreement.

- (ii) Reciprocity—in order to limit the scope of free-riding that may arise because of the MFN rule, and to obtain better access to foreign markets, it provides for reciprocity in concessions;
- (iii) Market access as enumerated in a schedule (list) of concessions (reduction of tariff and non-tariff barriers to trade), which can be changed in subsequent negotiations;
- (iv) Transparency—members are required to publish their trade regulations, and to allow review of administrative decisions affecting trade [Trade Policy Review Mechanism (TPRM)]; and
- (v) Safety valves—in specific circumstances, governments are able to restrict trade (safeguards).

The Ministerial Conference is the highest decision-making body of the 158-member multilateral organization which meets at least every 2 years. There is a General Council, which oversees the operation and implements the conference's policy decisions and is responsible for day-to-day administration; and a Director-General, who is appointed by the ministerial conference. The General Council also acts as a Dispute Settlement Body and a Trade Policy Review mechanism. Subsidiary bodies such as a Goods Council, a Service Council and a TRIPS Council are also established under the General Council. It is headquartered in Geneva, Switzerland. So far, none ministerial meetings have been held at: Singapore (1996), Geneva (1998), Seattle (1999), Doha (2001), Cancún, Mexico (2003), Hong Kong (2005), Geneva (2009), and again in Geneva (Dec. 2011) and in Bali (Dec. 2013).

3 Doha Round Negotiation

At its Fourth Ministerial Conference in Doha, Qatar in November 2001, the WTO launched the current round of trade negotiations, the Doha Round of trade negotiations. It is the latest round of trade negotiations among the WTO members, and the ninth round of trade negotiations since the GATT was launched and the first since the WTO inherited the multilateral trading system in 1995. Its aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules with an objective to make globalization more inclusive, particularly by slashing barriers and subsidies in farming, to help the world's poor. The work programme of Doha Round covers about 20 areas of trade. The Round is also known as the Doha Development Agenda as its fundamental objective is to improve the trading prospects of developing countries, which represent a majority of the world's population.

The Doha Ministerial Declaration provided the mandate for the negotiations, including on agriculture, services and intellectual property rights, which began earlier. Main areas of negotiation are: Agriculture, Non-agricultural market access, Services, Intellectual property, Trade and development, Trade and environment,

Trade facilitation, WTO rules and Dispute Settlement Understanding. The main aspects of negotiations are related to: market access, development issues, WTO rules, trade facilitation and other issues in each of these areas.

These ongoing negotiations are in-built in the last round of multilateral trade negotiations (the Uruguay Round). Negotiations are overseen by the Trade Negotiations Committee (TNC), chaired by the WTO's director-general. The intent of the round, according to its proponents, was to make trade rules fairer for developing countries. However, by 2008, critics were charging that the round would expand a system of trade rules that were bad for development and interfered excessively with countries' domestic 'policy space'. The negotiations are being held in five working groups and in other existing bodies of the WTO. The negotiations have been highly contentious and agreement has not been reached, despite the intense negotiations at several Ministerial Conferences and at other sessions. Disagreements still continue over several key areas including agriculture subsidies. Related negotiations took place in Paris, France (2005), Potsdam, Germany (2007), and Geneva, Switzerland (2004, 2006, and 2008). In 2008, negotiations broke down after failing to reach a compromise on agricultural import rules. The vexed issues include high levels of farm subsidy in the developed countries, demand for better market access for industrial products in the developing countries, level of farmers' protection in the poor and developing countries. There are also issues related to trade facilitation (TF) agreement and other pacts. Trade facilitation is considered as not only a major booster to the global economy but is also one of the major substantive issues that have made considerable progress in the Doha Round of negotiations. Over the years, several proposals have been made which are under revision. These are reflected in the latest draft of the negotiating text. The recent Bali deal on trade facilitation is seen as a boost required to infuse confidence in Doha round.

Developed nations, including the US, want India, Brazil, China and other emerging economies to be part of the four major sectoral pacts—TF, information technology (IT), environmental goods and international services agreement. But developing countries want agreement on agriculture products trade and opening of markets by developed countries, as also compliance with other agreements under the WTO. However, India has opined that it would not accept any agreement on IT and environmental goods. In the negotiations held during December 2012–January 2013 to further liberalize the International Technology Agreement and form a new plurilateral agreement on services with expanded coverage, India has expressed its strong opposition against this move by registering its protest and has backed out of negotiations. The original agreement, by way of a Ministerial Declaration on Trade in Information Technology Products (ITA) was concluded by 29 participants at the Singapore Ministerial Conference in December 1996. The number of participants has grown to 70 since then, representing about 97% of world trade in information technology products. The ITA provides for participants to completely eliminate duties on IT products covered by the Agreement. Developing country participants have been granted extended periods for some products.

The difficulties in the negotiations are encountered because of the complex nature of talks, with a broad array of subjects, and widely differing interests, even within countries. To this is added the key principle of ‘consensus’, that is, decisions are taken by consensus, which means everyone has to be persuaded before any deal can be struck (rule of ‘single undertaking’). The agreement arrived on each of the issues form officially part of the Doha round of negotiations and accepted as part of the ‘single undertaking’ in which all Doha round subjects form part of a single package, with ‘nothing agreed until everything is agreed’.

After the negotiations broke down in July 2008, major negotiations were not expected to resume until 2009. Nevertheless, intense negotiations, mostly between the USA, China, and India, were held at the end of 2008 in order to agree on negotiation modalities. The impasse was not resolved and, in April 2011, director-general Pascal Lamy asked members to think hard about ‘the consequences of throwing away 10 years of solid multilateral work’.⁶ Though no significant progress has eventuated from the negotiations, the WTO seems determined to persist with them. A report to the WTO General Council by Lamy in May 2012 advocated ‘small steps, gradually moving forward the parts of the Doha Round which were mature, and re-thinking those where greater differences remained’, and viewed that in the near term the members should look at reaping the ‘low hanging fruits’ as it would be difficult to conclude the Doha Round as a single package.⁷ At this time, the future of the Doha Round is uncertain.

3.1 Some of the Main Issues in Negotiation

Agriculture has become the lynchpin of the agenda for both developing and developed countries. Three other issues have been important. The first, now resolved, pertained to compulsory licensing of medicines and patent protection, which has been taken care of by the TRIPS Council Decision of 30 August 2003. Second deals with a review of provisions giving special and differential treatment to developing countries; a third address problems that developing countries are having in implementing current trade obligations.

(a) Agriculture

Agriculture was kept out of the purview of the GATT 1947 and the Contracting Parties were allowed to keep their restrictive policies under the provisional application of the Agreement of the GATT. But the WTO has a separate Agreement on Agriculture, which requires the abolition of trade-distorting practices by the members in this sector.

The root cause of distortion of international trade in agriculture is the massive domestic subsidies given by developed countries to their agricultural sector over the

⁶Available at: www.wto.org/english/tratop_e/dda_e/chair_texts11_e/dg_e.doc.

⁷Available at: http://www.wto.org/english/news_e/news12_e/gc_rpt_01may12_e.htm.

decades, which has led to excessive production and its dumping in international markets, along with the import restrictions to keep out foreign agricultural products from their domestic markets. In order to minimize such dumped exports and to keep their markets open for efficient agricultural products from other countries, the starting point has to be the reduction of the domestic production subsidies given by the developed economies, followed by reduction of export subsidies and volume of subsidized exports, and minimum market access opportunity for foreign agricultural producers. The WTO Agreement on Agriculture relates to domestic subsidies, export subsidies, including volume of subsidized exports, minimum market access commitment, and food stockholding/food aid operations.

Agricultural protectionism is quite common among developed countries, particularly in the European Union and the United States with massive domestic support and export subsidies, which have kept the competitive farming nations out of their markets by the mixture of trade barriers and subsidies. The Agriculture Agreement intended to open national markets to international competition through the replacement of non-tariff barriers with customs duties, and progressively reducing export subsidies and domestic aid to avoid over-production. The ‘minimum market access commitment’ applies only to those countries that maintain restriction of various kinds on agricultural imports.⁸ The ‘minimum market access commitment’ mandates these countries to allow a minimum market access opportunity of 3% of their domestic consumption for foreign agricultural products (this percentage to rise to 5% by the end of 6 years). They are also required to convert their non-tariff restrictions on agricultural imports into tariffs and reduce those tariffs by 36% over six years. These measures are aimed at to incentivize the international competition in farm products/exports.⁹

In the case of developing countries, the obligation to reduce domestic subsidies arises only if the total aggregate value of all subsidies given to farmers exceed 10% of the value of the total agricultural production of the country. The subsidies given to ‘low-income or resource-poor farmers’ are exempt from reduction obligation. The definition of a low income or resource poor farmer is left to the discretion of each country. In fact, Agreement talks about the special and differential treatment for developing countries for implementing reduction commitments over a period of 10 years; the LDCs are not required to undertake reduction commitments.¹⁰ A committee has been envisaged to supply basic foodstuffs to least-developed and net food importing developing countries. But not much progress has been registered on the commitments by the developed countries.

In the Doha Round, agriculture has become the most important and controversial issue. Agriculture is particularly important for developing countries, because around 75% of the population in developing countries live in rural areas, and the vast majority are dependent on agriculture for their livelihoods. There is a

⁸ Available at: http://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm.

⁹Ibid.

¹⁰The Agreement on Agriculture, World Trade Organization, 1995, Article 15.

disagreement between exporters of agricultural bulk commodities and countries with large numbers of subsistence farmers on the precise terms of a ‘special safeguard measures’ to protect farmers from surges in imports.¹¹ The first proposal in Qatar, in 2001, called for the end agreement to commit to substantial improvements in market access; reductions (and ultimate elimination) of all forms of export subsidies; and substantial reductions in trade-distorting support.

The United States is being asked by the European Union (EU) and the developing countries, led by Brazil and India, to make a more generous offer for reducing trade-distorting domestic support for agriculture. The United States is insisting that the EU and the developing countries agree to make more substantial reductions in tariffs and to limit the number of import-sensitive and special products that would be exempt from cuts. Import-sensitive products are of most concern to developed countries like the European Union, while developing countries are concerned with special products—those exempt from both tariff cuts and subsidy reductions because of development, food security, or livelihood considerations. Brazil has emphasized reductions in trade-distorting domestic subsidies, especially by the United States (some of which it successfully challenged in the WTO: US–Brazil cotton dispute), while India has insisted on a large number of special products that would not be exposed to wider market opening.

It is important to note that the recent Bali deal allows increase in the percentage of trade-distorting subsidy much beyond the 10% limit on the insistence if Indian. India pursued the matter in the light of the Food Security Act, 2013. The Bali deal allows it till the time a better mechanism is evolved without imposing the 2-year peace clause.

(b) TRIPS/Access to Patented Medicines

A major topic at the Doha ministerial was the WTO Agreement on TRIPS and the public health to meet the health needs in developing countries. The Doha Declaration on the TRIPS Agreement and Public Health was adopted at the Ministerial Meeting on 14 November 2001. On 30 August 2003, WTO members reached agreement on the TRIPS and medicines issue. Voting in the General Council, member governments approved a decision that offered an interim waiver under the TRIPS Agreement allowing a member country to export pharmaceutical products made under compulsory licenses to countries with insufficient or no manufacturing capacities in the pharmaceutical sector. To make this decision as a part of the TRIPS Agreement, the WTO members on 6 December 2005 approved changes to the TRIPS Agreement in the form of Article 31bis making permanent the decision on patents and public health.¹² The amendment will become part of the TRIPS, after being adopted by two-third of its members. There has been difference of opinion among members about the other IP issues which are the part of the

¹¹*Id.*, Article 5.

¹²Implementation of para 11 of the General Council Decision of 30 August, 2003 on the implementation of para 6 of the Doha Declaration on the TRIPS Agreement and Public Health [the “Decision”], WTO Doc. IP/C/41, 6 December, 2005, The Decision and Article 31bis give effect to paragraph 6 of the Doha Declaration.

agenda of the negotiations. There are three subjects mentioned in the agenda: geographical indications (GIs) and the others are related to ‘disclosure’ requirement about the origin of genetic material and traditional knowledge used in the inventions by the patent applicants. On GIs, agenda of the Doha round talks about the ‘negotiation to create a multilateral register for geographical indications for wines and spirits’. Developing countries want the higher level of protection for other products as well and not to be limited to wines and spirits only. Most of them feel that all the three subjects are inter-linked, but the approach towards the ‘disclosure’ requirement is very different among the countries. India and many other countries want an amendment of the TRIPS Agreement, Article 29, in this respect. But developed countries, led by the US, are of the view that it could best be achieved through national legislation and contractual arrangements to be regulated under national law.

(c) Special and Differential Treatment

The WTO Agreements contain special provisions which give developing countries special rights and which give developed countries the possibility to treat developing countries more favourably than other WTO Members. These special provisions include, for example, longer time periods for implementing Agreements and commitments or measures to increase trading opportunities for developing countries. These provisions are referred to as ‘special and differential treatment’ provisions.

In the Doha Ministerial Declaration, the trade ministers reaffirmed special and differential treatment for developing countries and agreed that all special and differential treatment provisions in different WTO agreements ‘be reviewed with a view to strengthening them and making them more precise, effective and operational’.¹³

More specifically, the declaration (together with the Decision on Implementation-Related Issues and Concerns) mandates the Committee on Trade and Development to identify which of those special and differential treatment provisions are mandatory, and to consider the legal and practical implications of making mandatory those which are currently non-binding. In addition, the Committee is to consider ways in which developing countries, particularly the least-developed countries (LDCs), may be assisted to make best use of special and differential treatment.

The negotiations have been split along a developing country/developed country divide. Developing countries wanted to negotiate on changes to special and differential treatment (SDT) provisions, keep proposals together in the Committee on Trade and Development, and set shorter deadlines. Developed countries wanted to study SDT provisions, send some proposals to negotiating groups, and leave deadlines open. Developing countries claimed that the developed countries were not negotiating in good faith, while developed countries argued that the developing countries were unreasonable in their proposals. At the December 2005 Hong Kong

¹³Briefing Notes, Cancún WTO Ministerial, 2003.

ministerial, members agreed on five SDT provisions for LDCs, including the duty-free and quota-free access for them.

Duty-free and quota-free access (DFQFA) currently discussed covers 97% of tariff lines and if the USA alone were to implement the initiative, it would potentially increase LDCs' exports by 10% (or \$1bn). Many major trading powers already provide preferential access to LDCs through initiatives such as the Everything but Arms (EBA) initiative and the African Growth and Opportunity Act.

(d) ***Implementation Issues***

Developing countries claim that they have had problems with the implementation of the agreements reached in the earlier Uruguay Round because of limited capacity or lack of technical assistance. They also claim that they have not realized certain benefits that they expected from the Round, such as increased access for their textiles and apparel in developed-country markets. They seek a clarification of language relating to their interests in existing agreements.

Around 100 implementation issues were raised in the lead-up to the Doha Ministerial Conference. More than 40 items under 12 headings were settled at or before the Doha conference, for immediate delivery; and the vast majority of the remaining items are immediately the subject of negotiations. At the Doha meeting, the Ministerial Declaration directed a two-path approach for the large number of remaining issues: (a) where a specific negotiating mandate is provided, the relevant implementation issues will be addressed under that mandate and (b) the other outstanding implementation issues will be addressed as a matter of priority by the relevant WTO bodies. Outstanding implementation issues are found in the area of market access, investment measures, safeguards, rules of origin, and subsidies and countervailing measures, among others.

4 Non-Agricultural-Market Access (NAMA) Negotiations

NAMA refers to all products not covered by the Agreement on Agriculture. In other words, in practice, it includes manufacturing products, fuels and mining products, fish and fish products, and forestry products. They are sometimes referred to as industrial products or manufactured goods. The mandate of the Doha Round is: 'To reduce or as appropriate eliminate tariffs, including the reduction or elimination of high tariffs, tariff peaks and tariff escalation (higher tariffs protecting processing, lower tariffs on raw materials) as well as non-tariff barriers, in particular on products of export interest to developing countries'.¹⁴

The negotiations aim to reduce or eliminate tariffs, including tariff peaks, high tariffs, tariff escalation and non-tariff barriers for non-agricultural goods, in particular on products of export interest to developing countries. The product coverage

¹⁴*Doha Round: What are they negotiating?*, available at: http://www.wto.org/english/tratop_e/dda_e/update_e.htm.

shall be comprehensive and without a priori exclusions. Special and differential treatment for developing and least-developed Members shall be fully taken into account, including through less than full reciprocity in the reduction commitments and measures to assist LDCs to participate effectively in the negotiations. With the reduction of tariff and non-tariff barriers, market access opportunities will increase for the goods of developing countries and LDCs. But the problems persist in the market access commitments.

5 Conclusion

When the Doha Round was launched, Ministers placed development at its centre. ‘We seek to place developing countries’ needs and interests at the heart of the Work Programme adopted in this Declaration’, they said. ‘We shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play’.

But after the protracted negotiations spanning over a period of more than 11 years, goals of the Doha Round are nowhere in sight. In the meantime, there has been continued impasse in the Doha round of negotiations since 2005. With its ambitious agenda and procedural hurdles, it is difficult to foresee any successful conclusion of the Round in the near future.

Amid talks of failure of Doha round of negotiations, USTrade Representative on 15 January 2013 has notified the US Congress of its intent to negotiate a new international trade agreement on services (ISA) and 20 countries, including Japan, the European Union and a mix of 18 other developed and developing countries, known as ‘Really Good Friend of Services’ (RGF) have come together for these negotiations, representing nearly two thirds of global trade in services. The US is currently the world’s largest service trader. However, China and India which together account for nearly 12% of global trade in services along with other BRICS countries have been absent from these negotiations. The BRICS countries have opposed plurilateral agreements within the WTO as being against the fundamental principles of transparency, inclusiveness and multilateralism. The impasse in the Doha round of negotiations has also seen the US Trade Representative pushing for regional trade agreements with the most prominent being the Trans Pacific Partnership (TPP), including countries from North America, Asia and Pacific, which represent 30% of global GDP. These developments are a matter of great concern, which may put in doubt the future of multilateralism in international trade.

Chapter 18

The Complexities of Nigeria's Copyright (Collective Management Organizations) Regulations, 2007

Olaolu S. Opadere

1 Introduction

The concept of copyright and its emergence are trite.¹ Thus, it suffices to say that copyright law is a branch of the law that deals with rights of intellectual creators²; which deals with particular forms of creativity pertaining mostly, but not limited, to matters of mass communication. It is concerned with virtually all forms and methods of public communication, printed publications, and with such matters as

¹See Uvieghara Egerton E., *Essays on Copyright Law and Administration in Nigeria* (Y- Books, Nig. Ltd, 1992); David Bainbridge, *Intellectual Property* (Pitman Publishing, 4th ed., 1992); Torremans Paul & Jon Holyoak, *Intellectual Property Law* (Butterworths, London, 1996); Jeremy J. Phillips, Robyn Durie, and Ian Karet, *Whales on Copyright* (London Sweet & Maxwell, 5th ed., 1997); Ilechukwu Magnus Olueze, *Nigerian Copyright Law* (Magnapress Ltd., 1998); J.O. Asein, *The Nigerian Copyright Act with Introduction and Notes* (Ibadan Sam Bookman Publishers, 1998); J.O. Asein & E.S. Nwauche (eds.), *A Decade of Copyright Law in Nigeria* (Nigerian Copyright Commission, 2002); Shyllon Folarin, *Intellectual Property Law in Nigeria*, (The Max Planck Institute for Intellectual Property, Competition and Tax Law, Munich, Vol. 21, 2003); Cornish, William, and Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, (Thomas, Sweet & Maxwell, 5th Ed., 2003); F.O. Babafemi, *Intellectual Property: The Law & Practice of Copyright, Trade Marks, Patent & Industrial Designs in Nigeria*, (Justinian Books Limited, 1st ed., 2006).

²There are also Laws in respect of Patents and Designs—CAP P2, Laws of the Federation of Nigeria (LFN) 2004; Trade Marks—CAP T13, LFN 2004; etc., all in respect of intellectual creations.

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sound and television recording and broadcasting, films for public exhibitions in cinemas, etc.³ It also deals with computerized systems for the storage and retrieval of information.⁴ Thus, Copyright Law protects only the form of expression of ideas, not the idea itself. Essentially, it protects the owner of rights in artistic works against those who ‘copy’.⁵ One of the crucial elements of the protection by the Nigerian Copyright Act (hereinafter referred to as ‘the Act’) is provided for in section 39, thereof, and classified as collecting society.⁶ The Act further describes it as ‘an association of copyright owners which has as its principal objectives the negotiating and granting of licenses, collecting and distributing of royalties in respect of copyright works’.⁷ It is observed that the provision of this section of the law, as referred, is too restrictive; in the sense that only an association of copyright owners qualify for the license to operate as collecting society. It is a needless inhibition on the qualification of those who may apply for license to operate as collecting society. To restrict or limit grant of the license to only copyright owners, is to greatly inhibit the purpose of the grant from the very outset. This observation is important because the Act supersedes the Regulations; and if the Act is defective, it cannot be rectified by the Regulations. Consequently, it limits the effectiveness of the Regulations. In this respect also, inference could be drawn from the view of Sagay, while discussing the topic of duress and undue influence, as it relates to composers/musicians and their managers, recording companies, etc., when he stated thus:

In recent years, the English Courts have extended the principles of restraint of trade (normally applicable between employer and employee) combined with the doctrine of unequal bargaining power, to contracts between artists, particularly composers and musicians, on the one side, and their business managers, recording companies or publishing houses on the other side: the latter being regarded as being in the position of employers and the former being in the position of employees. In all these cases,⁸ the courts refused to enforce the strict terms of the contracts involved on the ground that they were contrary to public policy because of the employers’ superior knowledge and ability and the inequality of the parties’ bargaining powers. The court held that the terms of the contracts in relation to the artistes were restrictive of trade and were onerous, unfair and unreasonable, and were only capable of being enforced in an oppressive manner. They were therefore void and unenforceable. One other important point made in these cases was that the manager in each case was skilled in business and finance, whereas the artists, composers or musicians, were only skilled in their art. There was therefore a presumption of undue influence in the relationships, and the absence of independent advice for the artists was fatal to the agreement in each case.⁹

³See Copyright Act—CAP C28, LFN 2004, sections 1 and 6, particularly, for works eligible for copyright and its general nature, *inter alia*.

⁴WIPO Intellectual Property Reading Material, Geneva, March 1998, at 3.

⁵Which expression denotes those who take and use the form in which the original work was expressed by the author, without license or due authorization.

⁶The Nigerian Copyright Act, 1990.

⁷*Id.*, Section 39(8).

⁸The cases referred to are: *Instone v. Schroeder (A) Music Publishing Co.* [1974] 1 All E.R. 174 C.C.A.; *Shroeder Music Publishing Co. Ltd v. Macaulay* [1974] 1 W.L.R. 1308; and *Clifford Davis Management v. W.E.A. Records* [1975] 1 W.L.R. 61.

⁹I.E. Sagay, *Nigerian Law of Contract*, (Spectrum Books Limited, Ibadan, 2nd ed., 2000) at 154.

The inference being drawn from the foregoing is that contrary to the requirement of the Act that collecting societies must be an association of copyright owners, it can be safely concluded that copyright owners may not automatically be able to manage businesses as required for the success of a collective management organization (CMO). This therefore necessitates the proposition that interested, skilled and independent managers like lawyers, accountants, etc., be enabled to form collecting societies, in conjunction with copyright owners, so as to optimize the economic advantages therefrom.¹⁰

The same section 39 of the Act contains further provision that empowers the Commission to make regulations specifying the conditions necessary to give effect to the purpose of the section of the Act.¹¹ It is implicit, therefore, that the germaneness of collecting societies to the optimization of copyright has necessitated this provision that anticipated the need for additional regulations.

2 Rationale for Collective Management

Collecting societies, otherwise known as CMOs, could best be described as ‘reapers of the harvest’, after copyright owners might have ‘sowed’ and ‘nurtured the seed’ of their intellectual prowess to maturity. Incidentally, if the harvest ripens and there are no effective, efficient and adequate reapers, then without doubt, a supposed bountiful harvest may be wasted or lost. Presumably, upon this implied understanding, section 39(7) of the Act¹² gave birth to the Copyright (Collective Management Organization) Regulations 2007, hereafter referred to as ‘the Regulations’.¹³ The term, ‘collecting society’, is generally used internationally to describe the organizations set up by the various categories of rights owners to administer their rights, collectively.¹⁴ It is incontrovertible that collecting societies or CMOs are indispensable in the maximization of copyright, which therefore necessitates an appraisal of the Regulations. In order to underscore the importance of CMOs, reference to the role and potentials of some CMOs in other climes, like

¹⁰See Olaolu S. Opadere, “Collecting Societies in the Nigerian Entertainment Industry: An Indispensable Tool for Optimization”, *Contemporary Issues of Law and Justice in Nigeria*, (Essays in Honour of Justice Umaru Ali Eri, OFR, 2008), pp. 160–178.

¹¹The Copyright Act, *supra* note 6, section 39(7).

¹²Ibid.

¹³The Copyright (Collective Management Organization) Regulations, 2007.

¹⁴Garnett Kevin, James Jonathan Rayner and Davies Gillian, *Copinger and Skone James on Copyright*, (Sweet and Maxwell, London, 14th ed., Vol. 1, 1999) at 1491; See also Shane Simpson, “The Role of Copyright Collecting Societies in Australia”, Simpson Solicitors, 135 Macquarie Street Sydney NSW 2000, Australia, Report to the Federal Government of Western Australia in April 1996, available at: <http://www.copyrightcollectingsocietiesinAustralia.htm> [accessed on September 10, 2009].

the American Society of Composers, Authors and Publishers (ASCAP),¹⁵ Broadcast Music Inc. (BMI),¹⁶ Australasian Performing Rights Association (APRA),¹⁷ *inter alia*, will suffice.¹⁸ In respect of the CMOs mentioned, they have added to the GDP of their respective nations, than some multinational corporations. Thus, the vantage position of CMOs cannot be disregarded or overemphasized. It is however worrisome that Nigeria, like many other developing societies, is not replicating the same.¹⁹ Many factors are responsible, some of which are contained in the regulatory frameworks: the Copyright Act and particularly the CMO Regulations, hereby focused upon.

Hitherto, the impact of collecting societies has not been felt in Nigeria. Though, on record, there are some collecting societies in existence, but which have been largely shrouded in confusion and controversies over the years.²⁰ Until recently,

¹⁵ASCAP was formed in February 1914 and is reputed to be the oldest of the major contemporary performance rights organisations (PROs). Its declared revenue for year 2007 was \$863 million and it paid royalties of \$741 million to its diverse membership of more than 315,000 music creators. See ASCAP, “ASCAP Achieves Outstanding 2007 Financial Performance” (2008), available at: http://www.ascap.com/press/2008/0208_financial.aspx [accessed on May 19, 2009].

¹⁶See Eliot Van Bushirk, “Record-Setting BMI Royalties Point the Way towards Music Licensing —Not Sales”, 2007, available at: http://www.wired.com/listening_post/2007/09/record-setting/ [accessed on May 19, 2009], to the effect that BMI was founded in 1939 to contend with the monopoly of ASCAP, among other things. Furthermore, for its fiscal year 2006–2007, it gave out \$732 million as royalties to its members. See also Marcus, “BMI Distributes More Royalties Than Ever Before” (2008), available at: http://blog.idiomag.com/2008/09/bmi_distributes_more_royalties_than_ever_before/ [accessed on May 19, 2009], which reveals that in 2008 BMI published \$901 million as its revenue, out of which \$786 million was paid as royalty to copyright holders. Furthermore, by its Annual Review of 2009–2010, it declared revenues in excess of \$917 million, for the fiscal year ended June 30, 2010; see “BMI Annual Revenue 2009–2010”, available at: http://www.bmi.com/pdfs/publications/2010/annual_review_0910.pdf [accessed on September 14, 2012].

¹⁷APRA was formed in 1926, and had gathered about 24,700 members by 1997–1998, to whom it distributed \$66.7 million in royalty payments. For the fiscal year 2006–2007, it paid \$122.9 million to a membership that had grown to over 48,500; See Research Hub, “Copyright and the Arts: Growth in Royalty Payment”, available at: http://www.australiacouncil.gov.au/research/visual_arts/reports_and_publications/copyright_and_the_arts_growth_in_royalty_payments [accessed on May 19, 2009].

¹⁸While arguing in favour of fair use, Thomson reported that in 2006, the copyright-controlled industry contributed \$1.3 trillion to the U.S. economy. See Iain Thomson, “Copyright ‘Harming’ the U.S. Economy” (2007), available at: <http://www.iwr.co.uk/vnunet/news/2198704/copyright-harms-economy-report> [accessed on September 10, 2009].

¹⁹See also Olaolu S. Opadere, “Copyright Protection as Catalyst to Economic Growth”, 2(1) *University of Benin Journal of Private and Property Law*, 2011, pp. 39–40.

²⁰See PMRS: “Press Release”, available at: http://www.pmrsnigeria.com/Press_Release3.html [accessed on June 8, 2009]; Omolodun A. Paul, “The Rights of NCC to Disapprove any Collecting Society”, *The Guardian*, Tuesday, January 16, 2007, at 70; Emman Anukwe, “MCSN Loses Operational Certificate”, *Nigerian Newsday*, Nassarawa State Weekly Newspaper, Tuesday, November 29, 2005; and Godwin Tom-Lawyer, “The Role of Collecting Societies in the Music Industry”, available at: http://lexprimus.com/Publications/The_Role_of_Collecting_Societies_in_the_Music_Industry.pdf [accessed on June 8, 2009].

there have been serious contentions between the NCC and the CMOs, on the one hand; and fight for supremacy—among other issues—between the CMOs themselves, on the other. It thus appears that much of the energy that should have been expended in bringing progress and fruitfulness to copyright in Nigeria has been dissipated in needless quarrels, and baseless divisive politicking; thereby giving room to copyright pirates and other infringers to flourish in their heinous businesses. For avoidance of doubt, nothing precludes the NCC from granting operational licenses to more than one collecting society in respect of any class of copyright owners, as long as it is satisfied that an existing approved society does not adequately protect the interest of that class of copyright owners.²¹ It is certain that a single collecting society cannot adequately protect the interest of one class of copyright owners in Nigeria, considering the largeness of the country, as well as endowment in the area of copyright works.²² As far as the Act is concerned, there is enough room for as many collecting societies as the Commission deems necessary for adequate protection of copyright. It is most certain, that for copyright protection to succeed, in the real sense of it, there must be very efficient CMOs.²³

3 CMOS VIS-À-VIS The Regulations

Making the crux of this appraisal the Copyright (Collective Management Organizations) Regulations 2007 is considered critical; because, if the regulatory framework for CMOs is defective, then the superstructure is bound to be defective; and may eventually collapse. The perceived defects hereunder enumerated are not exhaustive or all-encompassing, and do not necessarily signify the order of importance. They are simply meant to arouse curiosity in respect of the existing gaps, in the search for viable solution for the benefit of the CMOs.

²¹The Copyright Act, *supra* note 6, section 39(3).

²²In this regard, for instance, the United States of America has at least three major performing rights organisations (ASCAP, BMI, and SESAC) representing the interest of their diverse members.

²³See “NCC Extends Deadline for Collective Management Application”, *The Nation*, Sunday, September 6, 2009, at 35. While celebrating its 20th anniversary in 2009, the NCC made a heartening resolve to establish a viable collective management system. Thus, in furtherance of its effort to reposition collective management of copyright in Nigeria, organizations wishing to operate as collective management organisations were invited to formally indicate interest by forwarding their applications. This was a commendable effort, even though ultimately, not much came out of it.

3.1 CMOs: Charity or for Profit?

It is mandatory, by the provision of the Act, that CMOs be organizations incorporated as companies limited by guarantee.²⁴ This is considered to be a major error in law, thereby posing great limitations to the possibility of maximizing the CMOs.²⁵ First, the error lies in the requirement that a CMO must be a company limited by guarantee; whilst the Company and Allied Matters Act (CAMA) states clearly what that class of company is.²⁶ This is to the effect that a company limited by guarantee is mainly for promotion and charity, not for profit making, nor distribution or sharing of profit among member,²⁷ as done and expected to be done by CMOs. Section 26 of CAMA states thus:

Company limited by guarantee (1) Where a company is to be formed for promoting commerce, art, science, religion, sports, culture, education, research, charity or other similar objects, and the income and property of the company are to be applied solely towards the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as permitted by this Act, the company shall not be registered as a company limited by shares, but may be registered as a company limited by guarantee....(4) A company limited by guarantee shall not be incorporated with the object of carrying on business for the purpose of making profits for distribution to members....(6) If any company limited by guarantee carries on business for the purpose of distributing profits, all officers and members thereof who are cognizant of the fact that it is so carrying on business shall be jointly and severally liable for the payment and discharge of all the debts and liabilities of the company incurred in carrying on such business, and the company and every such officer and member shall be liable to a fine not exceeding N100 for every day during which it carries on such business....

Implicitly, this is also contrary to the intentment of the Act and the Regulations on their expectations from the CMOs vis-à-vis their functionality and/or modus operandi. Thus, there is the conflict of Laws: the Act and Regulations on the one hand, in contravention of CAMA, on the other. Second, is the misconception, as a result of the error in law, that CMOs are charitable organizations, which impliedly has informed the undue overbearing stance of the Commission, as shall be shown shortly. Third, is the consequential incapacitation of CMOs from being able to really function as profit making business organizations that they are, rather than charity; bearing in mind that the principal objectives of a collecting society are to

²⁴The Copyright Act, *supra* note 6, section 39(2)(a).

²⁵This perceived error is contained in the Nigerian Copyright Act, whereas, the major focus of this discourse is on the Regulations. However, this issue of CMOs as charity or for profit-making is regarded as fundamental to the functionality of CMOs. Hence its being regarded as a major issue for discussion in this critique.

²⁶Company and Allied Matters Act-CAP C20, Laws of the Federation of Nigeria, 2004, section 26.

²⁷*Id.*, sections 26(1), (4), and (6).

negotiate and grant licenses, collecting and distributing royalties in respect of copyright works.²⁸ It cannot be overemphasized that copyright management is purely business transaction, for profit making, on commodities produced by copyright owners not charity.

3.2 *Laxity on Public Notice*

The Regulations are to the effect that the Commission may communicate acceptance of an application to the applicant and where it deems necessary ‘may’ require the applicant to take such additional steps, including the advertisement of its application for grant of license to operate as a CMO in designated national newspaper(s).²⁹ The concern here is that the requirement of putting the public on notice with respect to an applicant-organization for CMO is not regarded, by the NCC, as important enough to be made mandatory. It is an anomaly! Suppose the CMOs are truly expected to function at par with their contemporaries in other jurisdictions as stated above—with such unprecedented access to huge financial and material resources, it would then be considered paramount that they be subjected to public scrutiny, from the very outset, and all through. Furthermore, the lax posture of the Regulations in this regard leaves room for unwholesome collusion between dubious Commission (NCC) officials (in the probability that they exist) and fraudulent applicant CMOs. In fact, it leaves room for suspicion. Public access in this type of situation should not be left to the Commission’s prerogative, only, but as a matter of right of public access not a privilege. For avoidance of doubt, the Commission is a specialized agency of Government, just as CMOs are specialized organizations with access to immense resources. Hence the public should not be left in obscurity as to which organization is being licensed, or how many of them are in existence, as the case was with the CMOs in the past. Whatever is done in this regard ought to be within public knowledge, more so that CMOs are treated as charitable non-profit making organizations, by the Act and the Regulations.

3.3 *Arbitrary Tendencies*

By a cumulative perusal of certain portions of the Regulations,³⁰ it is clear that the Commission tilts toward arbitrariness in its dealings with the CMOs; which thereby confronts CMOs with uncertain life expectancy. This is a situation where their life

²⁸The Copyright Act, *supra* note 6, section 39(8).

²⁹CMO Regulations, *supra* note 13, para 1(4).

³⁰*Id.*, para 2(e), particularly 3(2).

or death is left to the discretion of the Commission, without any predictable basis. Paragraph 2(a)–(d) appears clear and straightforward. It states thus:

The Commission may, on its own motion or on application by any interested person, revoke the license of a CMO where:

- (a) in the opinion of the Commission, the Collective Management Organisation, contravenes or fails to comply with any provision of the Act, these Regulations, direction or order made or given to it under these Regulations;
- (b) the Collective Management Organisation, no longer act for or represent the copyright owners of any class(es) of works in respect of which license was granted to it;
- (c) the Collective Management Organisation, failed to disclose material facts that, if known at the time of considering its application for a licence, would have constituted cause for refusal of the said application;
- (d) the Commission, becomes aware of facts unknown at the time of considering the application for grant of licence, or of subsequent occurrences which, if placed before the Commission, would have constituted a ground for refusal of the application for grant of licence (Emphasis added).

The importance of this observation is to the effect that if grounds of contravention are wholly left for determination within the opinion and/or prerogative of the Commission, it therefore makes such grounds and the exercise of the prerogative utterly subjective, and prejudicial to the interest of the CMOs. Determination of whatever offence, alleged against CMOs, that could attract a consequence as grave as revocation, should not be left to a mere ‘opinion’ of the Commission. Rather, it should be based on the preponderance of evidence. Furthermore, paragraph 2(e) appears nebulous and absurd, on the one hand; whilst confused, on the other. It states that:

The Commission may, on its own motion or on application by any interested person, revoke the licence of a CMO where: (e) on such other ground or grounds, that it would be reasonably justifiable, to refuse application for grant of licence to operate as a Collective Management Organisation. (Emphasis added).

It is nebulous in the sense that it confers an unguarded open-ended prerogative on the Commission to revoke license; and then suddenly confuses it with refusal of grant of license to an applicant. At inception, the paragraph talks of revocation of license, while sub-paragraph (e) dis-consonantly drifts into refusal of application for grant of license. There is no concurrence! The relevance of this observation, however, is that for a CMO, like any other business organization, to conduct its business profitably, there must be certainty of terms, climate, environment, as well as legislations and/or regulations. Where legislations or regulations are nebulous and/or equivocal, CMOs will operate harbouring fear of the uncertain legislation and climate; which will certainly affect productivity. The same applies in paragraph 3(3), where the Commission is unilaterally empowered to ‘refuse to approve an application for renewal of a license if, it is of the opinion that the CMO no longer meets the requirement for grant of license’. In this circumstance, what informs the ‘opinion’ of the Commission is uncertain. It is indisputable that where a regulatory

framework is as uncertain as this, particularly, when it has to determine the life or death of a CMO, then the functionality and profitability of such CMO cannot be guaranteed or optimized, for fear of sudden termination that may be occasioned at the whims and caprices of the Commission's 'opinion'.³¹

3.4 Regulatory Equivocation

As mentioned in the case of paragraph 2(e), while considering the arbitrary tendencies of the Regulation, it is further pronounced as regulatory equivocation as manifested in paragraph 7(1)(e), which states that:

- (1) Collective Management Organisation shall, within 30 days of occurrence, notify and furnish the Commission with information in respect of: ... (e) any decisions in judicial or official proceedings to which the society is a party, where the Commission so requires.... (Emphasis added).

The provision contained in the paragraph is to the effect that CMOs shall within 30 days of occurrence of certain developments, therein listed,³² notify and furnish the Commission with information. The operative word in the opening is 'shall'; whereas, paragraph 7(1)(e) took an abrupt somersault to subject the giving of such information to only 'where the Commission so requires'. This contradicts good legislative and/or regulatory drafting, which requires un-equivocation; otherwise, a law or regulation as the case may be, would lose its meaning and not be accorded any respect or attention due a serious legislation or regulation. If in the opening, the mandatory word 'shall' is used³³ and later in the same paragraph the mandate is whittled down, then such provision deserves no serious attention. In essence, this signifies that the Commission leaves room for certain regulations not to be regarded as serious or needing compliance.

³¹It is important to underscore that the Commission's opinion is determined at every given occasion by those running its affairs; which opinion may be determined by their pre-disposition to the various CMOs, as the occasion may arise.

³²CMO Regulations *supra* note 13, para 7(1)(a)–(e).

³³See *Amadi v. NNPC* (2000) 10 NWLR Pt. 674 at 97, where the court stated that: "the word 'shall', when used in an enactment is capable of bearing many meanings. It may be implying futurity or implying a mandate or direction or giving permission. If it is used in a mandatory sense, then the action to be taken must obey or fulfil the mandate exactly; but if it is used in a directory sense, then the action to be taken is to obey or fulfil the directive substantially." See also *Awuse v. Odili* (2004) 8 NWLR, Pt. 876, p. 481; *A.G. Abia State v. A.G. Federation* (2005) 6 SCNJ, 1 at 35, *inter alia*, for the interpretation of the word 'shall', when used in legislation and/or regulation.

3.5 Tariff Modulation

Regulation 7(4) makes clear the fact that tariff rates are modulated solely by and at the instance of the CMO, as long as the category of users affected is given public notice. This is considered inappropriate, oppressive, and exploitative; and it leaves room for arbitrariness on the part of the CMOs.³⁴ There ought to be a regulatory body for the fixing of tariffs comprising and/or in conjunction with representatives of the CMOs, users, rights holders, the Commission, and other key stakeholders; whilst still leaving room for variation or negotiation between users and CMOs as the occasion may demand. This further buttresses the fact that CMOs are out for profit and not charity, as implied by section 39 of the Act. Consequently, an average CMO seeks to maximize profit; without caution or regulation, however, this may be done to the detriment of users of copyright. In this regard, therefore, setting up a royalty board or copyright tariff board would be most appropriate and indeed helpful. Such arrangement would bring about stability and near-uniformity in the tariff regime. This proposition would serve diverse purposes: ensure stability and/or near-uniformity in tariff rates; checkmate frequent and arbitrary increase of tariff rates by unscrupulous and desperate CMOs; it gives the users an idea of the rate to look forward to, with the possibility of negotiating with the CMOs; *inter alia*. In this regard, one of the goals of the tariff regulatory body would be to set a tariff range for the various categories of works; as setting exact rates may be absolutely impracticable, unhelpful and/or out-rightly detrimental.

3.6 Loss of Confidentiality

The essence of paragraph 8 of the Regulations is appreciated to the effect that it seeks to checkmate the excesses of CMOs. It states thus:

Every society licensed under these Regulations to function as a Collective Management Organisation shall, cause a report, containing the minute and decisions taken at every meeting of the General Assembly and Governing Board of the society, to be entered in a special register kept for that purpose and a certified copy of such report shall, be submitted to the Commission where the Commission so requires.

³⁴See also para 13(2) for another such arbitrary provision, to the effect that “a collective management organisation shall, draw up tariff, in respect of remuneration it demands for the usage of copyright works administered by it.” Para 13(3) goes further to highlight certain yardstick for the setting of the tariff, which is here considered prone to abuse. The paragraph states thus: “In setting the tariff, an organisation may, take into consideration the following: (a) the monetary advantage obtained from the exploitation; (b) the value of the copyright material; (c) the purpose for which, and context in which, the copyright material is used; (d) the manner or kind of use of the copyright material; (e) the proportion of the utilization of a work in the context of exploitation; (f) any relevant decision of the Court or the Dispute Resolution Panel; and (g) any other relevant matter.”

However, to the extent that CMOs must divulge information of reports, minutes and decisions at every General Assembly and Governing Board of the Society is considered absurd, risky and going too far for the well-being of CMOs, and the safety of the NCC against needless litigation. The fact remains that each CMO seeks to enhance its position and advantages above others in the industry. However, in the possible event that there is a hideous and ill-intended employee of the Commission, he/she may (for instance) sell-out confidential information of CMO 'A' to CMO 'B', and vice versa. Thus, the implementation of such a Regulation requires great caution, and should be seldom exercised, or altogether reviewed.

3.7 Cost of Audit

The Regulation states that 'the Commission may, if it considers necessary, at any time, appoint an auditor to audit the accounts of a Collective Management Organisation and the cost of such auditing shall be borne by the organisation'.³⁵ The position of this regulation is considered inappropriate. This regulation seems to have lost sight of an earlier one, whereby it is required that there should be an 'undertaking by at least 5 Directors, including the Chairman of the company that, the company shall comply with the Copyright Act and the Regulations....'.³⁶ Thus, if there should be any occasion warranting the appointment of auditors, it could be presumed to be as a result of the failure or perceived failure of the undertaking directors; who must be made to pay the cost of such auditing. Such cost should not be borne again by the same CMO sought to be protected, otherwise, it would amount to double jeopardy. In effect, when such undertaking directors are made to bear the cost of audit, it would be a deterrent to others and for subsequent purposes. Also, the resources of the CMO, which is the reward for the sweat of some copyright owners, would not be further depleted.

3.8 Misuse of 'May'

One of such places evidencing the inappropriate use of the word 'may' is where a CMO exceeds its authorized expenditure limit of 30%.³⁷ The Regulation states that:

10(1) A Collective Management Organisation may, withhold from the amount collected or received by it, such deductions, necessary to cover any expenditure incurred in the fulfilment of its function and the amount so deducted, shall be within the limits to be decided by the Governing Board, subject to a maximum limit of

³⁵CMO Regulations, *supra* note 13, para 9(2).

³⁶*Id.*, para 1(2)(f).

³⁷*Id.*, para 10(1) and (2).

30% of the total royalties and fees collected during the year in which the deductions are made.

10(2) Without prejudice to sub-regulation (1) above, the Commission may, upon a prior written application of a Collective Management Organisation, approve the deduction of more than 30% of the total revenue of the organisation, to cover the Collective Management Organisation's expenditure. (Emphasis added).

In that case, the CMO and/or any of its officers responsible for such breach 'may' be liable to a caution and/or written admonition and be required to rectify the breach, as further noted in the Regulations, thus:

10(3) Where an organisation exceeds its authorized expenditure limit as provided in sub-regulations 1 and 2 above, the Collective Management Organisation and/or any of its officers responsible for such breach may be liable to a caution and/or written admonition and be required to rectify the breach within a specified time.³⁸ (Emphasis added).

The use of the word 'may', arguably, signifies that the Regulation does not regard such excessive spending of rights owners' resources as a grievous offence. The use of 'may' suggests that the Commission is not certain whether or not it should intervene in such hazy situation. In *Awuse v. Odili*,³⁹ the court expatiated on the connotation of the word 'may', thus:

The word 'may' is an enabling or permissive word. It connotes freedom or competence. It is also used to indicate that permission is requested by or granted to someone; or to indicate ability or capacity. In other words, the word 'may' gives power which could be exercised in certain cases.

As a matter of fact, the 30% granted for administrative cost is high enough, with grave impact on the resources of rights owners. Therefore, exceeding it, for whatever reason, is not to be glossed over, but seriously scrutinized; else, the essence of the CMO could be defeated. This further shows that the requirement on CMOs, being companies limited by guarantee, is not taken seriously, as required. Otherwise, having implicitly given the impression that CMOs hold in trust other peoples resources, the directors of such CMOs should be made to give account; because accountability in this circumstance should be regarded as sacrosanct.

³⁸*Id.*, para 10(3).

³⁹(2004) 8 NWLR PT.876, pp. 481–521; See also *Amokeodo v. IGP* (1999) 6 NWLR, PT.607, p.467 at 485, where the court observed that: "the principle governing the use of 'shall' in a legislative sentence is that it is generally imperative or mandatory. In its ordinary meaning, it is a word of command which is normally given a compulsory meaning because it is intended to denote obligation. It is sometimes intended to be directory only and in that case, it is equivalent to 'may' and will be construed as being merely permissive."

3.9 Settlement of Dispute

The Commission's zeal, to have disputes arising in respect of CMOs resolved by alternative dispute resolution methods,⁴⁰ through the Copyright Dispute Resolution Panel mandatorily, though commendable, is however contrary to Law. It suffices to say that the Regulation is a creation of the Copyright Act; hence it cannot attempt to override or give an impression of overriding the same Act that confers life and blood on it. The Act is absolutely clear on the approach to offences or disputes; to the effect that the Federal High Court has exclusive jurisdiction.⁴¹ If the Act, which is superior to the Regulations, does not foreclose recourse to Court, in the first instance, then the Regulations, which derive their existence from the Act, lacks the legal potency to foreclose it. It is within the prerogative of the CMOs and whoever is concerned to agree ab initio and/or decide whether to first refer to a dispute resolution panel, or resort to Court in the first instance. They should not be deprived of the right to contract and to be bound by their mutual agreement, on what they consider most suitable for them. In this regard, the Regulations are overreaching, and the provision in this regard considered null and void, to the extent of its inconsistency with the Act that created it.

4 Conclusion

It is considered necessary that the Regulation be revisited by the Commission and be thoroughly overhauled by a team of experts who have the utmost interest of copyright, copyright owners, the national economy, etc., at heart; in conjunction with the Commission. It is considered pertinent in this age and time that the CMOs be allowed to function without the unnecessary fetters around them, overtly or covertly, as suggested by the various depictions in the Regulations. Therefore, it is hereby advocated that with the vastness of the Nigerian copyright industry, multiplicity of CMOs would do more good than harm. As such, allowing more than one CMO in respect of a class of right,⁴² with the right modalities in place, may be most appropriate. As already observed, protection and proper administration of copyright, through the CMOs, possess the potential of transforming the national economy.

⁴⁰CMO Regulations, *supra* note 13, para 14.

⁴¹The Copyright Act, *supra* note 6, section 46.

⁴²See *Id.*, section 39(3), to the effect that "the Commission shall not approve another society in respect of any class of copyright owners, if it is satisfied that an existing approved society adequately protects the interest of that class of copyright owners". It is arguably implicit that this is one of the reasons why the Commission has hitherto not allowed multiplicity of CMOs.

Chapter 19

Intellectual Property Rights: National and International Perspectives

K. Sita Manikyam and A. Lakshminath

1 Introduction

Intellectual property (IP) has become more important in modern times both nationally and internationally. The extensive advertising and persuasive salesmanship of modern business have made increasingly valuable such forms of property as copyrights, patents and property in designs. The law of IP deals with legal rights associated with innovative or creative efforts. It covers all rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields. IP confers certain kinds of exclusive rights to intellectual capital.

Intellectual property rights (IPRs) are in the process of constant development. As technology in all fields of human activities is developing exponentially, the field of IP is also expanding correspondingly. As per the requirements of scientific and technological progress, new items are getting added to the ambit of IPRs by extending and expanding the scope of its protection. Bio-patents, software copyright, plant variety protections are to name a few, denote the contemporary developments in the field of IPR. Technological advancements and social evolutions necessitate constant reevaluation of IPR system.

Thus, the main justification for protection of IPRs can be summarized as follows:

- Protection of IP rights is an incentive to human creativity
- It provides necessary stimulation for new Research and Development (R & D)
- IP serves as an instrument for cultural, social, economic and technological development

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- New creativity helps create sustainable and competitive businesses locally and internationally
- IP-based industries contribute significantly to national economies
- IPR is a catalyst in the information technology development.

2 Categories of Intellectual Property

The subject matter of IP is very wide. There are several different forms of rights that together make up IP. IP can basically be divided into two categories, viz. industrial property and copyright. Traditionally, a number of IPRs were known collectively as industrial property. This mainly included patents, trademarks and designs. Now, the protection of industrial property also extends to utility models, service marks, trade names, passing off, geographical indications including indications of source or appellations of origin and the repression of unfair competition. It can be said that the term ‘industrial property’ is a precursor of the term ‘intellectual property’.

The scientific discovery of the inventor may be protected by the law of patents. The interests to be reconciled are those of the inventor, the industrial expert who exploits it, and the public. The first and the last are usually less able to protect themselves. English law does not give protection to scientific discoveries as such there must be a process which is patentable. Soviet and Czechoslovak laws go further than English law in protecting the discoverer of new scientific ideas. Between the brilliance of the laboratory worker and the successful marketing of a commodity, there is a wide gap which may require the expenditure of vast sums of money. A new drug must be subjected to wide clinical trials, and made the subject of a huge marketing campaign, before profit can be created by sales. Out of many discoveries, there are few that return gain. Hence the entrepreneur, who must risk much, drives a hard bargain with the inventor. It is to the advantage of the community that there should be a government instrumentality, which can guide the inventor inexperienced in the ways of industry to make the best use of his discovery.

It is urgent to address the following questions: How can developing countries use IP as a tool to advance their development strategy? What are the main concerns surrounding the issues of IPR for developing countries? Is IP directly relevant to sustainable development and to the achievement of agreed international development goals? Are they capable enough, especially the least developed among them, to formulate their negotiating positions and become well-informed negotiating partners? Policy makers should address these essential questions in order to be able to design IPR laws and policies that can suit the needs of their people and negotiate effectively for future agreements.

3 Patents and Public Health¹

Following the end of World War II, many developing countries shed their colonial status and became sovereign states. Most faced serious problems are poverty, illiteracy, ill health and unemployment. India, Pakistan, and Indonesia, for example, entered independence with less than one-fifth of their populations being literate.²

One area in which developing countries desperately needed technology was pharmaceuticals. Developing countries had no research and development capability in the pharmaceutical sector. They either imported drugs or left their citizens to rely on varieties of traditional medicine. The problem in importing drugs lay with their expense. In the 1960s, India, for example, had one of the poorest populations in the world yet also had some of the highest drug prices. A number of reasons were responsible for this, including the fact that Western pharmaceutical companies formed cartels that affected drug prices in developing countries. Another problem was that pharmaceutical manufacturers in the West were not doing research into the tropical diseases that affected poor people in developing countries because those people would not be able to pay for the products that came out of the research. Faced with continued high drug prices, developing countries like India embarked on a reform of the patent rules they had inherited from their colonizers.

As these policies began to bite, global pharmaceutical companies like Pfizer were faced with unprofitable operations in these countries. Essentially, developing countries were adjusting the rules of the patent game to serve their local industries in exactly the same way westerners had done. Pfizer and other large pharmaceutical companies reacted to these developing country initiatives by forming a strategy that would ultimately see all developing countries adopt patent laws that matched U.S. patent law.

The AIDS crisis in Africa and other developing countries began to grow to a scale no one could really comprehend or ignore. In the West, treatment for HIV/AIDS arrived at the end of the 1980s in the form of antiretroviral therapy. Antiretroviral therapy is aimed at halting the replication of the HIV in the individual and allowing the immune system to recover. The treatments have proven to be highly effective.

When patented antiretroviral therapies first appeared, they were expensive in the range of US\$10,000 to \$15,000 per person per year. For people in developing countries living on one or two dollars a day, the price of antiretroviral therapies represented a king's ransom.

The relationship of patents and public health is indeed very complex. It is important to note that patents are not the only factor that plays an important role in

¹See generally Peter Drahos, "Building Institutions of Hope", *Trading in Public Hope*, 592 Annals 18, 2004.

²S. Salazar, "Intellectual Property and the Right to Health", WIPO/OHCHR, *Intellectual Property and Human Rights*, A Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, Switzerland, 1999, at 71.

determining access to drugs but other factors, such as infrastructure and professional support also play significant role. But, at least in principle, patent monopolies place the companies holding them in a strong position to set prices at high levels, and this can have a profound impact on the ability of poor people to acquire them. As noted above HIV/AIDS pandemic has helped to bring some of the issues to the forefront.

3.1 Novartis Case: A Critique³

In the last three decades, the global gold rush for patents has been dominated by filings for minor and mostly inconsequential innovations at the expense of breakthrough innovation. In large part, this is because weak standards in the patent laws of developed countries (led by the U.S. and Europe) have explicitly encouraged this shift. The whittled-down, lobbied-out, stretched-beyond recognition of patent regime that is characteristic of these countries and other less-developed countries where they influence the polity is unfortunately the ‘norm’ to which India now finds itself an ‘outlier.’ But the outlier is a solution: the norm is the problem. A *British Medical Journal* report from 2012 succinctly summarizes the global research situation for new medicines: ‘This is the real innovation crisis: pharmaceutical research and development turns out mostly minor variations on existing drugs, and most new drugs are not superior on clinical measures’.

The symbolic opportunity presented by the Supreme Court’s backing of Indian patent law, however, is a real threat- and pharma CEOs in New York, London and Basel get it. In the long run, as more countries understand the Indian model, appreciate its legitimacy, and reflect on its benefits to both public health and innovation, they might want the same. And if that happens, when that happens, we may begin to see real, positive change in the way pharmaceutical innovation works.

The Indian Patents Act, 1970 was a game changer. From the perspective of 43 years of experience, we can safely say that it shook up the pharmaceutical industry and altered it irreversibly. The new, empowered scenario was most vividly illustrated during the peak of the HIV/AIDS treatment crisis in the first decade of the twenty-first century, when countries like Brazil, Thailand, South Africa and, of course, India, took health security into their own hands and legitimately moulded their domestic patent systems to respond to the crises within. The Indian Patents Amendment Act of 2005, which gave us the law we have today—a law which was ratified recently has the potential to change the game once again. A biological sequence which existed in the natural environment would be now considered as a discovery but a protein which is artificially engineered and represents a new product and not normally found in nature would be considered as an invention.⁴

³*Novartis AG v. Union of India & Ors AIR 2013 SC 1311.*

⁴Ibid.

The text of section 3(d) of the Indian patent act which is the main focus of interpretation in *Novartis* case states that the subject matter of an invention should not be a mere discovery, it should not be new form of a known substance and it should result in substantial increase in efficacy over the relevant prior art. Under section 3(d), incremental inventions can be patented, provided they entail demonstrable novelty and improved usefulness.

In the *Novartis* case, the court ruled that better bio-availability by itself was not reason enough for a patent, unless it contributed to more effective treatment. It appears to be in line with the public health imperative recognized by the Doha Declaration of the TRIPs agreement. Access must be balanced with the incentive to create. Pharmaceutical companies invest a great deal of money and effort to produce new drugs, and if generic companies could simply reverse-engineer them, it could discourage invention. It could be argued that modifications to minor ends also deserve their own rewards, but that must be separately worked.

Novartis ruling of the Supreme Court has clarified that it does not mean no minor variations are patentable that assessment depends on the test of therapeutic efficacy. Glivec (Gleevec) does not pass that test, at least based on the evidence presented by *Novartis*. However, the judgment has left key questions open. For instance, would reduced toxicity be considered a factor in measuring efficacy, and if so, does the lower dosage required due to better bio-availability contribute to this? These ambiguities should be resolved to the extent possible, if India is to have a balanced and clear policy on pharmaceutical innovation.

Supreme Court restricted the scope for pharmaceutical patents. Where access to the patented product often stood between good and bad health, and sometimes, between life and death itself. The ruling might seem somewhat commonsensical to someone without specialized knowledge of IP. But even for a specialist, a close look at the judgment would reveal that it is in conformity with traditional patent concepts and unlikely to impact pharmaceutical innovation in a significant way, as many have suggested.

However, even outside this national interest perspective, one needs to ask: is the real purpose of patent law the protection of investment? Or is it meant to protect ideas that reflect some creative spark and represent a real cognitive advance? It may be argued that if the real goal is to protect pharmaceutical investments in R&D, we must do so more directly without torturing our patent regime and diluting its standards. In any case, the patent regime is thoroughly inefficient in protecting pharmaceutical R&D.

A more optimal regime would offer protection commensurate with the actual quantum of R&D investment made by the drug originator. This is an important point to appreciate, given that many drugs owe their origins to university research and government funding. Further and more egregiously, drug companies often claim ‘marketing’ costs as R&D costs.

Further, given the myriad problems with exclusive market protection and excessive monopoly pricing, generic companies should be free to enter the market on day one, after paying some compensation to the drug originator. This would

encourage more competition and keep the prices low for the consumer, while at the same time compensating the drug originator for their R&D investment.⁵

One of the most useful outcomes of the Supreme Court judgment is a renewed focus on what innovation is and how it should be rewarded. Behind the headlines foretelling various levels of doom, the death of innovation in the country, and the end of research for diseases which matter to us is the popular idea that patents are a proxy for innovation. After all, patents are widely understood as short-term monopolies enshrined in the law and provided as incentive to inventors on the evaluation of publicly disclosed innovation. It would seem as if patents are synonymous with innovation. Except, this is not quite the case.⁶

When it comes to drug discoveries, only 12–13% drugs are breakthrough drugs, less than 40% are moderately therapeutic breakthrough drugs and 50% are ‘Me-too’ drugs. Then as far as foreign investment in research and development is concerned, foreign companies really do not invest in India. They earn much more from a single market like the US. In fact, many experts argue that in the backdrop of a strong patent regime, rulings like this will spur innovation because only breakthrough drugs will give companies the opportunity to recoup their investments. The effort to balance affordability and innovation is being reiterated across the developing world—from China to Argentina.⁷

There are growing legal challenges to patents that have been evergreened with incremental chemical changes that are without similarly incremental therapeutic value. The EU is also taking increasing note of big pharma’s efforts to block the market entry of generics by filing umpteen patent applications for the same medicine. A common technique employed, called evergreening of patents, is to make some modification to the original patented drug, claim it is a new product deserving a patent in its own right, and secure a fresh patent.

India’s 2005 law guards against such evergreening, by laying down conditions, in section 3(d), that require the incremental invention to possess both novelty and a significant increase in drug efficacy for it to be eligible for a patent. All that happened with the Glivec verdict is that the Supreme Court established that Novartis failed to show eligibility for patenting under 3(d) for the beta crystalline form of Imatinib Mesylate.

Better alternative to weakening the patent regime is price control. The Doha Declaration on Public Health authorizes WTO members to take appropriate measures to make drugs affordable to their people. Price control is one such measure. It needs to be used more liberally across the spectrum of patented drugs. This will allow patent holders to retain their monopoly. The Gates Foundation offers a few million dollars as a prize for whoever comes up with a vaccine for some disease, on the condition that the vaccine would bear no IP charge.

⁵Shamnad Basheer, “Patent with Purpose”, *Indian Express* April 3, 2013.

⁶“Why Novartis Case Will Help Innovation”, *The Hindu*, April 15, 2013.

⁷“Right Prescription”, *Times of India*, April 3, 2013.

On one hand, we have the AIDS campaign and NGO's backing India for having laws which do not allow companies to enjoy extended period of protection so that those medicines can be easily distributed to most of the developing world. On the other hand, we have the IP advocates making the argument that companies should be given extended period of protection so that this will increase profits which in turn will be spent on research and development for many other lifesaving drugs and will cure many illnesses.

From the aspect of pharmaceutical industries in the US, we understand that cost of innovation is related to profits earned. If we separate lifesaving drug to other drugs and suggest a solution, then only those drugs which are lifesaving, will not enjoy extended protection and other drugs will. That statement in itself is flawed because then there is no incentive to research lifesaving drugs, if there is no return on those investments.

But the current situation demands that access to medicines is a must and of prime importance and therefore there is so much lobbying behind this as India should remain the 'pharmacy of the developing nations'. It is no exaggeration that millions of patients in developing countries can go to sleep in peace knowing that their drugs are on the way from India. And the present situation at least from the developing world perspective and AIDS campaign activists and NGO, etc. India is being commended for having a 'A patent law that puts public health first' This problem does not have a quick fix and therefore, we need countries to come together with compassion and solve this situation. The solution will be a middle ground between access to medicine and heightened IP provisions.

These are exciting times for India because we will see better IP law enforcement and on the other hand, international investment will increase in the upcoming years. With all the lobbying and all the politics involved, it can be hoped that the suffering of individuals due to lack of access to medicines is reduced and a solution is reached wherein people have access to medicines and yet in the future, India will be able to comply TRIPS plus provisions.

Indian Judicial system has again proved its ability and strength to block all attempts from multinational pharmaceutical giants to cash upon the life of thousands of patients those who have been fighting for their life either in hospital bed or at home. The decision to provide free of cost medicine regardless the company withdraw its charity is another land mark in this direction. Innovation and patent are two separate things, innovations should be for serving humanity especially whatever in the field of medical science, patents should not have only one objective to amass profit.

4 Stem Cells—Culturing Life (Therapeutic Cloning)

Stem cell research holds great promise for improving human health by developing various body organs and replacing the damaged organs with the newly developed organs. This also raises several ethical, social and legal issues. The issues are

destruction of human embryos to create human embryonic stem cells, comodification in human tissues and organs, barriers for economically backward classes, use of technology for gene line engineering and reproductive cloning, safety and rights of those donating gametes/blasto-cysts/somatic cells for derivation of stem cells, umbilical cord cells, foetal tissues for use as stem cells, protect research participants receiving stem cell transplants and patients at large from unproven therapies or remedies.

Stem cells are increasingly used for treating diseases like osteoporosis, diabetes, benign tumours, hepatic and renal failures and even find use in treating congenital disorders like autism and there are efforts now being made to make the same facilities available to people in India. India has the highest number of annual births worldwide and has promise of the largest supply of cord blood in the world.

As far as the medical community is concerned, India is lucky to have it complementing the government in its efforts to promote stem cell research. The Indian Council for Medical Research (ICMR) draft guidelines for stem cell research in 2004 specifically state that although there must be a regulatory apex body for monitoring purposes, sources of stem cells can include those derived from foetal tissue. The preamble to the guidelines is in itself an indication of the nation's will to be a world leader in this field. It states, 'The profound characteristic of a stem cell is its capacity for extensive self-renewal and retention of multilineage differentiation potential'. Recent research suggests that human stem cells can give rise to many different types of cells, such as muscle cells, nerve cells, heart cells, liver cells, limb cells, hematopoietic cells, etc., giving the hope for major advances in health care. The era of clinical marrow, tissue and organ transplantation is poised for breakthrough with the possibility of stem cell transplantation and therapy. Realizing the potentials of this new technology in modern therapeutics and biomedical research, it is strongly recommended that stem cell research and its clinical applications should be promoted in the country. With more than 15 labs in the country involved in this work and a 500 crore rupees department of biotechnology budget, 30% of which is allocated for stem cell-related study, there was more good news when recently, Histostem—a well known South Korean biotechnology company that is engaged in developing human cell-based therapy expressed interest in setting up a stem cell bank in India. The company has developed the technology of mixing cord blood for transplantation to adult patients and is looking towards to make this treatment available for patients in India as well. India is certainly exhibiting the potential to become a global hub for this kind of research.

Thus, it can be seen that India has, by and large, been very supportive of stem cell research. Some are even optimistic enough to suggest that the biotechnology boom could result in India being a nucleus for stem cell research.

James A. Thompson's (of Wisconsin Alumni Research Foundation) isolation of Human E.S. Cells in 1998 set off a big effort to turn basic technology into treatment for various diseases. This is viewed as the first major step to isolate the human ES Cells and grow them in culture and was heralded as one of the greatest scientific

discoveries in history. Some scientists complained that the Wisconsin patents are too broad and the University's enforcement efforts impeded research. The Geron Corporation, which financed some of Thompson's Research projects, has exclusive commercial rights to heart, nerve and pancreatic cells derived from human ES Cells.

Once created, these 'blank slate' cells can be nudged toward developing into other cell types. Skin cells can ultimately be transformed into brain cells, for example. That while cells might be specialized to do one thing, they have the potential to do something else, which really lays the groundwork for all the excitement about stem cell biology. A surprisingly simple recipe could turn mouse skin cells back into primitive cells, which in turn could be prodded into different kinds of mature cells. The work was later repeated with human cells. In theory, those primitive cells are 'blank slates' like embryonic stem cells that can be turned into any cell in the body. These groundbreaking discoveries have completely changed our view of the development and cellular specialization. We now understand that the mature cell does not have to be confined forever to its specialized state.

By reprogramming human cells, scientists have created new opportunities to study diseases and develop methods for diagnosis and therapy. Turning a skin cell into a stem cell takes weeks in a lab. Scientists introduce two to four genes that turn the cell's own genes on and off. It is a little like rebooting a computer, changing the cell from running the collection of genes that make it a skin cell into using another set that makes it a stem cell. The idea of reprogramming cells has been put to work in basic research on disease, through an approach sometimes called 'disease in a dish'. The reprogramming allows scientists to create particular kinds of tissue they want to study, like lung tissue for studying cystic fibrosis, or brain tissue for Huntington's disease. By reprogramming cells from patients with a particular disease, they can create new tissue with the same genetic background, and study it in the lab. That can give new insights into the roots of the problem. In addition that approach allows them to screen drugs in the lab for possible new medicines. Mr. Gurdon and Mr. Yamanaka were awarded Nobel Prize for 2012 for their pioneering work in transforming the field of 'regenerative medicine' the search for ways to cure disease by growing healthy tissue.⁸

'The eventual aim is to provide replacement cells of all kinds, and to be able to find a way of obtaining spare heart or brain cells from skin or blood cells. The important point is that the replacement cells need to be from the same individual, to avoid problems of rejection and hence of the need for immunosuppression'.⁹

⁸"Nobel Prize for Stem Cell Invention", *The Hindu* October 09, 2012.

⁹Ibid.

5 Information Technologies and IPRS

Electronic information processing and communication is another key technological field in which tremendous advances have taken place in a very short time. Like biotechnology, information technology has multiple industrial applications. The main sources of innovation in Information Communication Technology (ICT) are the software, hardware, semiconductor and telecommunications industries. But there are also other types of business involved in the ICT sector that have an interest in IP regulation including those that do not themselves innovate in this particular field, such as those which use ICT to provide services or ‘content’ to consumers.

Content providers tend to take a hard line on IP rights, favouring protection as strong as, if not stronger than, the levels of copyright protection available to businesses operating in the more conventional environments such as print. On the other hand, ISPs generally have little reason to favour strong copyright protection of Internet content, especially given the possibility of finding themselves held liable for the copyright infringements of their users.

While there is nothing new in patenting telecommunication technologies or copyrighting books and motion pictures, the ICT revolution has pushed the boundaries of the IPR system in a number of different ways, and it has the potential to push them still further. For example, though software programs are, arguably, no more than a long sequence of binary-coded instructions to a computer, copyright law nowadays treats them as if they are literary works. In the United States, programs are now patentable as well. In the United States, it is possible to obtain patents for computer programs if they produce a tangible effect.

Software and database producers use copyright law not only to protect expressions but also to limit access to information. For example, software developers can copyright both the source code and object code of their programs. Additional protection can be secured by keeping the source code secret, and also through restrictive licences. Developing countries are required, under TRIPS, to protect software by means of copyright law and semiconductor designs through the *sui generis* system. However, TRIPS does not explicitly state that they have to allow the patenting of programs. It is possible to argue that since patents must be available for all fields of technology, protection must be extended to computer programs. But this may not necessarily be the case. The European Patent Convention expressly prohibits the patenting of computer programs.

Information technology provides both opportunities and threats for the copyright industries, including the publishing industry, which is the main supplier of educational and technical knowledge content. It has been argued that technological developments make it difficult for both authors and publishers to control the dissemination and use of works, and to enforce their exclusive rights. In fact, technology can be employed to assist rights owners in tracking their works, in facilitating collection and distribution of monies payable to authors. Technological developments also enable the digitization of copyright works and facilitate access to many works, which hitherto may have been unavailable to many consumers.

6 Traditional Knowledge and IPRs

Traditional knowledge (TK) of the Earth is based on thousands of years' of experience. It is developed and preserved by local and indigenous communities for centuries as a strategy for their survival in the biosphere. TK is often part of the social fabric and everyday life of a community.

TK includes:

1. Cultural knowledge;
2. Artistic knowledge;
3. Medicinal knowledge;
4. Biodiversity/Natural Resources knowledge;
5. Agricultural knowledge; and
6. Sacred knowledge.

Some important characteristics of TK can be identified as follows:

- i. it is transmitted from generations to generations;
- ii. in many cases, it is transmitted orally for generations from person to person;
- iii. it is being considered by the communities as gift of God and not as a private property;
- iv. such knowledge typically distinguishes one community from another;
- v. it is usually impossible to identify the original creator of the information;
- vi. it is learned through continuous observation, experience and practice;
- vii. it is inseparable part of communal and cultural life of its holders; and
- viii. it is usually associated with the biological resources.

No clear formula has been reached to date as to the strategies that should be devised to protect various forms of TK. There are manifold complex issues that are impeding the legal recognition, protection and enforcement of rights attached to TK.

6.1 Need to Fill the Vacuum Created by TRIPs and TRIPs Plus

TRIPs, which was the result of seven years long and arduous negotiations, is regarded as the most effective international instrument providing for the formal legal regime on IPR. While TRIPs agreement lays down in detail the kinds of IPR entitled for protection under its umbrella, it conveniently excludes the TK from the list of subject matters qualified for IPR protection. This non-inclusion of TK took place in the agreement even when it extended protection for microorganisms and microbiological processes.

TK was not even considered for a *sui generis* protection as in the case of plant varieties. TRIPs agreement has made protection for plant breeders' rights (PBRs) obligatory. To include plant varieties under the regime of IPR, the TRIPs have

lowered the criteria standards and provided for weaker requirements. It substituted ‘distinctiveness’ for the requirements of utility and non-obviousness. Such an attempt was never endeavoured in the case of TK. There were demands from the countries including India to accommodate TK as a part of agenda for discussions and debates on TRIPs negotiations. However, the TK rich developing countries were not successful in incorporating their interests in the TRIPs due to the diverse and conflicting views of developed countries from the North. Surprisingly, the post TRIPs regime also continued the same approach by giving no room for TK in the ministerial conferences held subsequent to the conclusion of TRIPs agreement.

To value and preserve the heritage of our composite culture is a fundamental duty of every citizen under Article 51(f) of the Constitution of India. However, we have not enacted so far any legislation based on this provision for translating this constitutional objective into reality. Thus, we fail to protect not only the indigenous knowledge but their culture and heritage also.

6.2 Special Legal and Constitutional Status of TK Holders

In the absence of any law to protect the TK and practices of the indigenous communities, there is no obligation from a purely legal perspective to reward or compensate the communities responsible for the development and maintenance of such knowledge. This can be better achieved by giving special protection in the constitution itself to the indigenous and local communities with reference to their knowledge.

The system of IP rights, by principle, exists to encourage innovations and discourage embezzlement of knowledge. The preservation and protection of TK is not only a key component of the basic right to life and self-identification and a condition for the continuous existence of indigenous and traditional peoples; it is also a central element of the cultural heritage of humanity.

Now, coming to the national scenario, past experiences reiterate that our traditional, indigenous and local knowledge and associated resources are being used to make patented commodities for global trade. India could certainly revoke certain patents based on our precious TK. But, how long and how many times should Indian government indulge in this legal battle? Having a law in place to protect TK would have made it difficult for foreign countries to patent products based on our TK associated with plants like *neem*, turmeric, *karela*, *brinjal*, etc., so unique to India. Issues like *neem* patents and *turmeric* patents and pomegranate should not recur.

Biopiracy threatens the everyday survival of ordinary Indians who belong to indigenous and local community and who hold valuable TK. If biopiracy is not stopped, our unique TK will be continuously threatened, misappropriated and patented by foreigners. Failure to enact appropriate legislation for the protection and conservation of TK is costing the country dearly.¹⁰

¹⁰Gavin Stenton, “Biopiracy within the Pharmaceutical Industry: A Stark Illustration of How Abusive, Manipulative and Perverse the Patenting Process Can Be Towards Countries of the South”, 26(1) *Eur. Intell. Property Rev.*, 2004, pp. 17–26.

The government must also develop appropriate policy measures to implement the recommendations of National Knowledge Commission (NKC). NKC has made several recommendations on strategies to promote the knowledge systems of traditional medicine which include transformation of traditional medicine education by introducing evidence-based approaches, strengthening research on traditional health systems, strengthening pharmacopoeial standards, promoting traditional medicine by increasing quality and quantity of clinical trials and certification process, by digitizing TK and by creating suitable framework of IP rights, by establishing goals for conservation of natural resources, by promoting international cooperation, by supporting primary health care in rural areas creating a major rebranding exercise of Indian traditional medicine.

There are many unresolved technical issues such as the problem of collective ownership and the modes of enforcement of rights. One reason for lack of clarity about the rationale for protection stems from the different meanings given to the concept of protection. Some understand this concept in the context of IPRs, where protection essentially means to exclude the unauthorized use by third parties. Others regards protection as a tool to preserve TK from uses that may erode it or negatively affect the life or culture of the communities that have developed and applied it. Protection has a more positive role in supporting TK based communities livelihoods and cultures, as proposed by the Organization of African Unity's (OAU's) Model Law and its definition of community rights.

The consideration of TK protection should not overshadow the fact that the preservation and use of TK require ensuring the survival and improvement of living conditions and cultural milieu of such communities. Indigenous and local communities must be given right to participation in rule-making process. At the local level, the local and indigenous communities have interests to ensure that the use, exchange and benefit sharing aspects respect their customary laws and institutions. Indigenous communities need to be included and involved at every stage of such rule-making process involving the issue of access and benefit sharing.

7 Recent Developments

7.1 *Lex Genetikos*

(a) Cloning: Moving towards the Clonage

The word ‘cloning’ means a ‘viable human or animal cell generated from a single parent’. A clone is a twin of the individual cloned with a time gap. The subject burst into the public consciousness in 1997, following the announcement of successful cloning of ‘Dolly the Sheep’. Subsequently, it captured the attention and generated worldwide debate.

Cloning remains an ethical issue and the cloning debate involves scientists, legislators, religious groups, philosophers and many others. In fact, the notion involves critical issues about identity and individuality, differences between procreation and maintenance, and relationship between generations.

(b) Cryonics: Panacea for Future Immortality or Not?

Cryonics is a practice of using very cold temperatures to preserve human bodies when ordinary medicine can no longer sustain life, with the hope of reviving them sometime in the future. However, this practice has in the recent years faced opposition all around the world as there exists no law which protects the public health from unburied or untreated corpses.

Thus, taking into consideration the emerging trends and developments in technology, it is the pressing need of the hour that India formulates a legislation which can prevent and regulate the practice of cryopreservation.

(c) Assisted Reproductive Technology: Is it a Back-Up Plan?

This refers to methods to achieve pregnancy by artificial or partially artificial means. It is primarily used in infertility treatment. Technically, laboratory mix-ups (misidentification, transfer of wrong embryos) are important issues. There are emotional issues like a relationship between child and a surrogate mother. The ethics involve in vitro fertilization, surrogacy and sperm donation. Further, the ethical issues include reproductive discrimination against unmarried individuals, religious issues and citizenship of children born out of surrogacy.

8 Biotechnology and IPRS

Biotechnology encompasses first, second and third generation biotechnologies. The first generation includes traditional technologies like beer brewing and bread making, and the second begins with microbiological applications such as those developed by Louis Pasteur. Tissue culture and modern plant and animal breeding also fall within this ‘generation’. The third generation biotechnologies or the ‘new biotechnologies’ include recombinant DNA (‘gene splicing’), and genomics (Genomics refers to the mapping, sequencing and analysis of the full set of genes (i.e. the genome) of different organisms or species). The rate of advancement of biotechnology varies considerably in developing countries, depending on the capacity of their research institutions and businesses to generate biotechnological inventions. For example, Brazil, China, Cuba and India have adopted third generation biotechnologies.

8.1 *Lex Pharmacia*

(a) Drug Discovery and Patents

It is the process by which drugs are discovered and designed. The process involves the identification of candidates, synthesis, characterization, screening and therapeutic efficacy and once a compound has shown its value in these tests, it will begin the process of drug development prior to clinical trials. Issues include the entire process of bringing a new drug or device to the market including drug discovery, product development, preclinical research (microorganisms) and clinical trials (on humans).

(b) Clinical Trial: Placebo and Nocebo

Clinical trial is the application of scientific method to understand the response of human or animal biology to a drug. Clinical trials have great potential to benefit the patient, improving the therapeutic regimes and towards advancement of evidence-based medical practice. However, the deduction based on clinical trials in fields is the most difficult scientific and analytical proposition. Thus, in the present scenario, a need has been felt for the transparency, accountability and accessibility in order to re-establish the public trust in clinical trials.

Nearly 20% of the human genome is already patented. But in a recent landmark judgment, Robert Sweet, a senior U.S. federal judge who serves on the United States District for the Southern District of New York, invalidated 7 of the 23 patents on two genes BRCA1 BRCA 2. In 2008, the Myriad Genetics won a protracted battle to retain some European patents on BRCA1; the scope of the patents was reduced to cover only certain mutations. The two genes are commonly tested for mutations to determine the risk of developing breast and ovarian cancer. The Utah-based Myriad Genetics and the University of Utah Research Foundation are holding the patents. Though patents cannot be granted to ‘products of nature’, thousands of genes have been patented on the ground that isolated and purified genes are distinctly different in character and composition from those present in our body. Significantly, the invalidation of Myriad’s patents has come on the basis of the very arguments the company’s counterparts had put forth earlier in defence of gene patents. What is laudable is Judge Sweet’s brilliant assessment of scientific facts to invalidate every claim of the company. For instance, he refused to accept that isolated and purified genes are structurally and compositionally different from those occurring in the body. The verdict also summarily rejects as ‘erroneous’ the premise that isolated DNA molecules are like any other chemical compound.

Exclusive licences, with some exceptions, are a great barrier to fostering research. There is no incentive to make diagnostic tests cheaper either; Myriad charges about \$3000 to sequence the two genes to look for cancer-causing mutations. The fact that 10–15% of all inheritable breast and ovarian cancers have a mutation in these two genes, and about 5000 new cases of both cancers are detected

every year in the European Union makes a strong case against exclusive licences. The National Institutes of Health (NIH) encourages non-exclusive licences for gene diagnostics. This currently provides a standard for NIH employees, and may soon become applicable to those receiving NIH grants.

A recent controversy over the commercial introduction of privately developed *Bt. Brinjal* shows once again that politics and civil society pressure and not science can often become the guiding lights of decision making in this country. In the process, India missed a golden chance of devising a stable and sound policy on genetically modified (GM) Crops.

9 India Story—From Strength to Strength

IP law has travelled from the fourteenth-century *letters patent* to its present form. It really has the capability of influencing almost all spheres of human life. Patents and other proprietary rights granted on life like genes, microorganisms raise a lot of issues which only time can answer. At the same time, a proper balancing of public and private interests is paramount to maintain the equilibrium. The fact that even a country like USA, is contemplating measures to regulate patenting of life forms shows the sensitivity of the issue. Thus, it is very important for our policy makers to keep abreast of the rapid changes happening globally in this sensitive field so that they can perform the perfect ‘balancing act’ which adequately protects creativity and safeguard the interests of the public. Developing countries like India need more *balancing acts* which can propel their creativity to new heights and at the same time promote public interests.

The public sector has become leaner and meaner in most developing countries and inevitably in the long run, there has to be a closer relationship, more interaction and greater matching between the business sector and R&D institutions and productivity improving centres. This applies especially to the development of IP capabilities and assets needed for technological upgrading and diversification so as to gradually fill up the ‘missing middle’, a weakness typical in the enterprise structure in most developing countries. Large firms, rather than SMEs, account for about two-thirds of domestic manufacturing output and up to four-fifths of direct export earnings in most parts of ASEAN. This is due, in part, to the lack of a dynamic core of SMEs (Small and Medium sized enterprises) as leading, first-rank subcontractors or joint-venture businesses in their own right. At the same time, parallel efforts have also to be made to eliminate a variety of unintended biases against SMEs, and in favour of large firms, in the policy environment in many countries—including through the so-called ‘perverse incentive syndrome’, and in the sequencing and timing of various policy measures for economic reform and restructuring ways and means will also have to be in place to leverage technological capabilities as well as to share costs and risks, including through the policy-induced

promotion of partnerships and alliances in R&D among local firms and/or with external end users. Such linkages (backward, forward and lateral) have been of rising importance for IP creation, registration and commercialization in many countries since the late 1980s. This can be done through Private–Public Partnership.

Trade policy and liberalization constitute only necessary but not sufficient conditions to growth and development. Trade facilitation and competition are in fact flanking policies, beyond trade considerations based on traditional comparative advantage considerations. Whether it is a recovering Japan, China, India or the ASEAN that will provide leadership in furthering integration in the region, the geo-economic and geopolitical implications have to be differentiated. Even a small city-state Singapore has contributed in some manner to bilateral trade arrangements going outside of the region. In the final analysis, while the economics of trade liberalization and economic integration remain the underlying logic of the various modalities, it should be strategically tempered with pragmatism as a second best policy.

Chapter 20

The Changing Contours in the Regime of Copyrights in India with Reference to Broadcasting

T. Vidya Kumari

1 Introduction

The expansive legal terrain of copyrights is mired in controversies and complexities on the recognition and enforcement of rights granted therein. The ambit of this category of Intellectual Property has always been open ended. The Berne Convention of 1886 as amended in 1979 defines “literary and artistic works” in the form of illustrations. Article 2(1) defines the works as “it shall include every production of the literary, scientific and artistic domain whatever may be mode or form of its expression such as books, pamphlets, lecture...”.

The Indian Copyright Act suffers from brevity. The works are classified in Section 13 as:

- (a) Original literary, dramatic, musical, and artistic works;
- (b) Cinematographic film; and
- (c) Sound recording.

Apart from these works the derivative rights that are distinct, independent and separate have been introduced in the year 1994—They are:

- (a) Rights to performers; and
- (b) Broadcast Reproduction Rights to the Broadcasting Organisations.

This chapter is confined to the changing contours in the ambit of Broadcaster's. Rights taking into consideration the immense potential of the Broadcasting media to generate revenue. It further recognizes the fact that the Broadcasting Organisations have been an equally useful source of constant information, entertainment serving the societal interests.

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2 Broadcasting: Meaning and Source of Rights

The Broadcasting Media has been aptly described¹ as a powerful purveyor of ideas and values that nurture and cultivate diverse opinion, educating and empowering people to be informed so as to effectively participate in the democratic process, preserving, promoting, and projecting the diversity of Indian culture and talent.

Broadcasting is described as² assembling and programming any form of communication content like signs, signals, writing, pictures, images, and sounds and either placing it in electric form on electromagnetic waves or specified frequencies and transmitting it through space or cables to make it continuously available on the carrier waves so as to be accessible to single or multiple users through receiving devices either directly or indirectly in all its grammatical variations and cognate expressions.

The sources for the rights to Broadcasting Organisations can be traced to three main categories of law.

2.1 *Common Law*

Common Law, also known as Judge made Law has been successfully filling up the lacunae in the National legislations by expanding the regime of Law of Torts to protect human values and provide sustainable development and growth of the society in a fair and equitable manner. The Broadcasting Organisations have relied on a varied class of torts to protect their interests.

2.2 *International Conventions*

The Berne Convention has in its Article 11bis conferred on the authors of literary and artistic works the exclusive right of authorizing

- (d) The broadcasting of their works or the communication thereof to the public by any means of wireless diffusion of signs, sounds, or images;
- (e) Any communication to the public by wire re-broadcasting of the broadcast when this is made by any organization other than the original one; and
- (f) The public communication by loud speaker or by any other analogous instrument transmitting by signs, sounds, or images, the broadcast of the work.

The Rome Convention 1961 defines Broadcasting as the transmission by wireless means for the public reception of sounds or of images and sounds. Article 6 states

¹The Indian Broadcasting Services Regulation Bill, 2007, Preamble.

²*Id.*, Section 2(d).

that each Contracting state shall grant National Treatment to Broadcasting Organisations provided the Head quarters of the Broadcasting Organisations is situated in one of the Contracting states; and the broadcast is transmitted from a transmitter situated in another state.

Article 13 provides rights to the Broadcasting Organisations to authorize or prevent

- (a) The rebroadcasts;
- (b) Fixation of the works without prior authorization;
- (c) Reproduction of the fixation; and
- (d) Communication to the public the broadcasts.

The Convention relating to the Distribution of Programmes by Signals Transmitted by Satellite of 1974 recognizes the right to transmit through Satellite. This Convention, however, does not apply to direct transmission by Satellite.

The TRIPS Agreement confers under Article 14(3) the right to the Broadcasting Organisations to prohibit fixation, reproduction of fixation, and/or re-broadcasting by wireless means without prior permission of the owners.

The Draft WIPO Treaty on Broadcasting Organisations³ has been in circulation for many years. Several Papers by the Member Countries with alternate proposals were forwarded, yet the negotiations remain inconclusive. The primary reason for its failure is the lack of clarity in its objectives. While some states suggest that the Treaty may be confined to prohibition of transfer of signals and to curb piracy of signals, the need for control over the contents was emphasized by a sizeable group of states. The prime objectives of the Treaty are to:

- (a) Promote access to knowledge and information;
- (b) Curb anti-competitive practices;
- (c) Promote public interest in sectors of vital importance and strive for socio economic scientific and technological development; and
- (d) Protect and promote cultural diversity.

It follows the pattern of the Internet Treaties of WIPO (WIPO Copyright Treaty and WIPO Performance and Phonogram Treaty of 1996) by insisting on technological anti circumvention measures to control the contents of the Broadcast and includes protection to rights management information. Exclusive rights for the retransmission of the broadcasts are included in this Treaty. The beneficiaries of this Treaty are not confined to Broadcasting Organisations, it protects the webcasters and cable casters. The exceptions and limitations to these rights are left to the discretion of individual states. The proposal to extend the rights of Broadcasting Organisations in the digital media is the most formidable feature of this Treaty. It raises apprehensions that it will hamper the free flow of information and permit the right holder to retrieve the content that has passed into public domain.

³The Draft WIPO Broadcasting Treaty and its impact ton Freedom of Expression is available at: <http://unesdoc.unesco.org/images/001464/146498e.pdf>.

The Treaty needs a balanced approach. Following observations may be relevant:

- (a) The definition of Broadcasts is too wide;
- (b) Any extension of the rights to include signals over computer networks needs to be avoided;
- (c) The rights need to be confined to signals and not contents;
- (d) Technological measures must be confined to lawful broadcasts; and
- (e) Limitations and exceptions to the rights must be in tune with the Development Agenda.

2.3 National Legislation

The special rights called Broadcast Reproduction Rights are conferred under Section 37 of the Copyright Act, 1957 as amended in 1994.⁴ The Broadcast reproduction Right includes:

- (a) The right to rebroadcast the broadcast;
- (b) The right of sound recording/visual recording of the broadcasting; and
- (c) The right to disseminate the broadcast to the public by audiovisual means.

This right subsists for 25 years from the year in which the broadcast is made. The right is subject to the certain exceptions. The Act permits the sound/visual recording of the broadcast solely for *bona fide* teaching and research; and use for reporting current events.

In *Ministry of Information and Broadcasting v. Cricket Association of Bengal*⁵, the organizers of the cricket match the BCCI and Cricket Association of

Bengal (CAB) permitted a foreign Broadcasting agency the World Production Establishment (WPE) representing the interests of Trans World International (TWI) to telecast all the matches organized by the Cricket Association. The Ministry of Information and Broadcasting strongly rejected the Agreement between the CAB and the foreign Broadcasters on the grounds that it violates Section 4 of the Indian Telegraph Act of 1885 as prior permission of the Union Government was not obtained for the foreign telecasts.

The CAB sought the intervention of the Calcutta High court the court permitted the telecast with an added clause that permitted the Doordarshan to act as the host broadcaster on payment of 5 lakhs per match to the organizers. The CAB went in Appeal to the Apex court.

The main issues considered were:

- (j) The independence of the organizers to select the Broadcasting Organisations of their choice;

⁴The Copyright (Amendment) Act, 1994, chapter VIII, Sections 37 to 39A.

⁵[1995] 2 SCC 161.

- (k) The intervention of the government in the transmission of the terrestrial signals of the event; and
- (l) The claim of the Door Darshan to be the host broadcaster of the event.

The Supreme court opined that:

- (a) Air waves are public property to be used to the greatest public good. They cannot be utilized by a few privileged persons;
- (b) Private broadcasting licenses cannot be treated on par with the right of press; and
- (c) Unless the rights of viewers are given primacy, the affluent alone will have the sole right of viewer ship.

Therefore, the Door Darshan was permitted to telecast the matches on payment of 5 lakhs per match to the organizers.

In case of *Ten Sports v. Citizen Consumer and Civic Action Group*⁶, the Pakistan Cricket Board had invited bids in March 2003 for acquiring the telecast rights of the matches in the country. The Ten Sports acquired these rights for 42.6 million dollars. When the Indian players decided to participate in the events, the Door Darshan requested the government to permit simultaneous telecast by the Door Darshan. The Indian Government granted the rights to DoorDarshan. The permission was challenged by the foreign Broadcaster. The Apex court permitted the telecast on payment of 10 crores by the Door Darshan to the foreign broadcasting organization. Later, Sports Broadcasting Signals (Mandatory sharing with Prasar Bharati) Act, 2007 was passed making it mandatory for all content holders and sport broadcasters to share the live telecast with Prasar Bharati for simultaneous transmission by Prasar Bharati on its exclusive network.

In case of *Aasia Industrial Technologies Ltd and others v. Ambience Space sellers Ltd*⁷, the rights of the Broadcasting Organisations were protected *de hors* the Copyright Laws.

When there was a wrong interception of the advertisements and the permitted advertisements were substituted with the local brands. This wrongful breach of the rights of the broadcasters was held as:

- (a) Tort of passing off;
- (b) Tort of inducing a breach of contract;
- (c) Tort of conversion; and
- (d) Violation of Copyright Broadcast Reproduction Rights.

The plaintiffs Asia Industrial Technologies Ltd were the exclusive licensees to broadcast the program on Zee TV. As the program was free to Air, the revenue was generated through advertisements. The defendants using sophisticated equipment had intercepted without valid authorization to insert their own advertisements. Tort of Passing Off was established as the defendants made a false representation that the

⁶Interim Order, (2004) 5 SCC 351.

⁷1977 [99] Bom LR 613.

wrongfully inserted advertisement was an authorized communication permitted by the broadcasting organization. It induced a breach of existing contract between the advertisers and the broadcaster with the wrongful interception knowingly preventing one party from performing its contract. It was a tort of conversion.

The Indian courts have recognized “electric energy” as goods. Despite the fact that it was not a tangible property signals/air waves can be transmitted, transferred, delivered, stored, possessed, the same way as any other moveable property. The two elements of conversion were established herein

- (a) An act inconsistent with the rights of the owner act of removing the original advertisement; and
- (b) Denial of the right of the owner substituting the local products clearly amounts to conversion.

The intervention of the Broadcasters rights falls within the purview of Copyright Laws.

In *Star India Pvt Ltd v. Piyush Agarwal and Others*,⁸ the STAR TV was assigned the Broadcasting Rights of the Cricket organized by the BCCI. The Broadcasting Organisation filed a suit against Piyush Agarwal (Cric Buzz),

India Cellular (Idea), and On Mobile Global Ltd for disseminating information gathered from the broadcasts and transmitting it in the form of live score cards, Match updates, score alerts via short messaging services SMS and Mobile Value added Services MVAS.

The main allegations of the plaintiff made against the defendants were:

- (a) The Broadcasting Organisation and the organizers of the match have proprietary interest in the entire contents of the event and have the sole right of communicating the proceedings of the events to the public. It applied the “Hot News Doctrine” as enunciated by the US Supreme court in the case *International News Service v. Associated Press*, wherein a legal principle was laid down that news acquired by employing own means and resources creates a proprietary right to the publishers and permits the publisher to prevent others from disseminating the news without prior permission. In support of this argument, it referred the decision given in the case of *Marksman Marketing Services Pvt Ltd v. Bharati Televentures Ltd and Others*⁹ wherein the Hot news principle was reaffirmed;
- (b) The dissemination of information amounts to unjust enrichment as the enrichment was at the expense of the plaintiff usurping the benefits that accrue to the plaintiffs for investing huge amount in conducting/communicating to the public.
- (c) It was an act of unfair competition for wrongful appropriation of the skill and labor of the competitor.

⁸MANU/DE/0644/2013.

⁹O.A.No 78/2006.

In response the defendants claimed that:

- (a) The use of the information in the public domain is permissible under the Copyright Laws. It relied on the judgment of *ICC Development International Ltd v. New Delhi Ltd*¹⁰;
- (b) It was an act of fair dealing;
- (c) The plaintiffs at best can claim copyright over the film/audio recording/the broadcasting rights and no more; and
- (d) The Hot news doctrine was rejected by later decisions of the courts.

The division bench overruled the decision of the Single Bench that allowed the information to be used after 2 min. This Maggie Rule was considered as too short a period to move the information into public domain. The court insisted that the defendants were required to obtain the license of the organizers for disseminating contemporary match information in the form of ball by ball or minute by minute score updates, match alerts, etc. No restrictions were made on reporting noteworthy information as and when it arose, as stale news is no news.

There was no requirement for a license if the information is given gratuitously, or after a time lag of 15 min. The Hot News principle was followed in special circumstances wherein the information is generated at a cost, it is time sensitive, or the use by others can be considered as unfair. There have been several cases on the merger of rights in case of ownership of a cinematograph film and in sound recording. The Amendments of the Copyright Act in 2012 have established the rights of the authors and the claims made therein for equal royalty on par with the owners.¹¹

¹⁰C.S.O.S. No. 2416, 2012.

¹¹The relevant amendments in 2012 relating to Broadcasting Organisations are the notion of merger of rights on assignment for the purpose of sound recording/producing and exhibiting a cinematograph film is totally dispensed by relevant Amendments in 2012. (i) There is no discrimination between the authors and the Owners of Copyrights Under Section 35 the words “owners of copyrights” is substituted with the words “authors and other owners” to be included as members of the governing body for the administration of Copyright societies;

(ii) The right to claim royalty and other considerations is granted to the assignor of rights in the new Sec 18; (iii) The right of the authors to receive royalty is a non assignable right that cannot be waived Section 18; (iv) Exclusive right is granted to the performers under Section 38A (1)(b) to broadcast the performance, except where the performance is already broadcast; and (v) Section 31 D provides statutory licenses’ to the Broadcasting Organisations desirous to broadcast a literary, musical work or sound recording that is already been communicated to the public. They are now permitted to rebroadcast the program provided (a) Prior notice is given to the owner; (b) Royalty is fixed by the Copyright Board and is paid in advance before the broadcast; (c) There are separate rates of royalty for radio broadcasting and TV broadcasting; and (d) No alteration can be made to the original work; (vi) Section 19 No assignment of Copyright in any work to make a cinematograph film shall affect the right of the author from claiming equal share in the royalties or consideration for utilizing the work in any other form; and vii. Section 39A The Broadcast Reproduction Right shall not affect the separate Copyright in any work in respect of which the broadcast is made.

3 Conclusion

The author concludes with a word of caution. The government needs to be vigilant to handle new situations. For instance, in a recent judgment by the United states court of Appeals in the *Aero* case,¹² the court permitted the use of tiny antennae similar to a rabbit's ears for private transmission to individual viewers. This was allowed as the act did not amount to "communication to the public" The broadcasts were viewed separately by the viewers, each downloading with the assistance of separate antenna. Copyright laws need to be in tune with the new technologies.

¹²*WNET v. Aero*, US court of Appeals for the second Circuit Docket case 12-2786 decided on 04-01-2013.

Chapter 21

Copyright Law in Nepal: Challenges of Effective Implementation

Karna B. Thapa

1 Introduction

Man as a creature has the capacity to invent new things and create new idea needs to get the fruits of his labour. Such protection should be ensured by some legal provisions. Property occupies eminent place in person's life as means of survival and development. A man's property is all that is his in law.¹ Various opinions have been put forward on the definition of the term 'property'. Blackstone has written about master's right over the person of servant and father's right over the children as property. Hobbes thinks of 'things held in propriety, those that are dearest to a man are his own life and limbs; and in the next degree, in most man those that concern conjugal affection; and after them riches and means of living'. Locke in the like manner says 'every man has a property in his own person', he speaks of man's right to preserve his property that is life, liberty and estate.² But now neither person's love or conjugal affection nor a right of a master over servant or right of father over child may be regarded as property. New forms of property such as patent, copyright and trademarks, although intangible, have emerged within the category of incorporeal property. The present chapter presents the Nepalese law of copyright with special focus on the chapter of implementation.

¹P.J. Fitzgerald (ed.), *Salmond on Jurisprudence* (Sweet & Maxwell, London, 12th ed., 1966) at 411.

²Ibid.

2 A Brief History of Copyright Law

Copyright law initially developed in England in the sixteenth century as the government sanctioned and supported grant of printing privileges to certain master printers in exchange for their loyalty and assistance in ferreting out anti-government writers and publishers.³ As copyright initially was conceived as a way for government to restrict printing, the rights of the authors were not protected until the British Parliament first enacted copyright law in 1710. The first copyright law which was known as ‘An Act for the encouragement of learning, by Vesting the Copies of Printed Books in the Authors or purchasers of Such Copies, during the time therein mentioned’ gave the legal claim of ownership of piece of a literary property to the person who created the work or to a person who acquired the rights in the work from the author. As the law passed in eighth year of the reign of Queen Anne, it was called ‘Statute of Eighth Anne’ in short. The statute of Anne was the first real copyright act, and provided for rights to publishers for a fixed period.

British copyright law was in force in all British colonies including America before independence. Thus, the history of copyright in America linked with the British history of copyright law. However, American copyright law directly derives from constitution. Article 1 of American Constitution gives basic authority for modern U.S copyright law by stating that ‘The congress shall have the power to promote the science and useful arts, by securing for limited times to authors and Inventors the exclusive right to their respective writing and discoveries’.⁴ As a result, the Congress in 1790 by adopting the statute gave authors who were U.S citizens the right to protect their books, maps and the chart for a total of 28 years. In the following years of 1802, 1831 copyright laws were made to protect the various aspect of copyright such as photography and musical composition. Major revision was done in 1909 and present U.S. copyright law was adopted in 1976. So far as the Indian history of copyright is concerned, it starts with the enactment of Literary Copyright Act by the British Parliament because the Act had to be applied to the British colonies. Thus, this Act which provided protection for copyright in books published on British soil, automatically got extension to the British India.⁵ After Independence, India made her own Copyright Act in 1957 suitable to the changed condition. The Act, in order to be made expedient, was amended time to time and is in force with these amendments.

Nepal entered in relations with the various countries after political change of 1950 and came under influence of different legal systems. Nepal before 1950 had relation only with British India at international level. So whatever the laws Nepal had, they particularly were influenced by the common law system.

³ Available at: <http://en.wikipedia.org/wiki/Copyright>, [accessed on February 23, 2013].

⁴ Don R. Pember, *Mass Media Law* (McGraw Hill, New York, 2002) at 505.

⁵ J.P. Mishra, *An Introduction of Intellectual Property Rights*, (Central Law Publications, Allahabad, 2nd ed., 2009) at 67.

Even after 1950, various laws enacted have been influenced by Indian Laws. Before 1950, Nepal under an autocratic rule of Ranas had no modern laws. Nepal established the system of enacting laws by parliamentary process only after 1950. Thus, in the changed context and to meet the need of the time, Nepal came up with the process of enacting laws. In this context, Copyright Act 1965 and Patent, Trademark and Design Act 1965 were made to provide protection of intellectual property. As the law made at that time was insufficient to deal with legal complexities, the new Copyright Act was enacted in 2002 to bring it in line with international convention.

3 International Legal Framework on Copyright Law

Nearly all international human rights instruments provide the protection of the intellectual property rights of an individual. Universal Declaration on Human Rights, 1948 (UDHR) provides that everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Not only UDHR other international human rights treaties have also emphasized on protection and recognition of intellectual property rights.⁶ Besides, other international conventions, treaties have been concluded focusing on protection of intellectual property rights such treaties are discussed here in brief.

3.1 *The Berne Convention for the Protection of Literary Artistic and Works, 1886*

Berne Convention, 1886 is the first document of international character providing for the protection of intellectual property right in general and copyright in particular. Berne Convention for the Protection of Literary and Artistic Works contained two basic provisions. First, adoption of the principle of national treatment, and second, enjoyment and exercise of copyright effectively and subject to no formality. The Convention also sets out the minimum duration for which copyright will apply in various types of work.

The Convention set out exclusive rights which are as follows⁷:

- the right to authorize translations of the work,
- the exclusive right to reproduce the work, though some provisions are

⁶The International Covenant of Economic, Social and Cultural Rights, 1966, Articles 25(2), and 27 (2).

⁷The Berne Convention for the Protection of Literary and Artistic Works, 1886, Articles 11, 11bis, 11ter, 12, 13, and 14.

- made under national laws which typically allow limited private and educational use without infringement,
- right to authorize public performance or broadcast, and the communication of broadcasts and public performances,
- the right to authorize arrangements or other types of adaptation to the work,
- recitation of the work, (or of a translation of the work),
- the exclusive right to adapt or alter the work,

3.2 The Universal Copyright Convention, 1952

Universal copyright Convention is another significant event for the protection of copyright. The convention set out the obligation for contracting state to provide for adequate and effective protection to authors and other copyright proprietors in literary, scientific and artistic works including writings, musical, dramatic and cinematographic works and painting, engraving and sculptures.⁸ Similarly, the convention provides for national treatment for published and unpublished works of one member country by other member country of the convention.⁹ The convention sets out the term for protected right which is for life of the author and 25 years after his death.¹⁰ Convention provides exclusive right to the author for publication and translation of protected works.¹¹ Contracting states were required to make suitable changes in their national copyright laws to give effect to the provisions of the convention¹² and a committee to monitor the implementation of convention was also formed under the convention.¹³

3.3 The Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, 1961

The areas left in the Berne Convention such as, rights of performers, producer of sound recording and broadcasters were covered in this convention. As these areas lack the intellectual touch, the concept was to be included in the Rome Convention as ‘neighboring rights’ and not in Berne Convention. The convention defined

⁸The Universal Copyright Convention, 1952, Article 1.

⁹*Id.*, Article 2.

¹⁰*Id.*, Article 4.

¹¹*Id.*, Article 5.

¹²*Id.*, Article 10.

¹³*Id.*, Article 11.

national treatment, set out conditions for according national treatment, and provides for protection of phonograms, broadcasts and Performers.

3.4 The Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms, 1971

The convention creates obligation for the contracting state to protect the interests of producers of phonograms as there was widespread and increasing duplication prevalent. The contracting states had to make provisions for the duration of protection provided to the producers of the phonograms. The Convention attempts to curb the unauthorized duplication of phonograms.

3.5 The Convention Establishing the World Intellectual Property Organization, 1967

Establishment of the world intellectual property organization has been a very significant step towards strengthening the copyright regime. The convention provides that the term ‘intellectual property’ includes the rights related to literary and scientific works, performance, phonograms and broadcast, inventions, scientific discoveries, industrial designs, trademarks, service marks and commercial names and design.

3.6 The Agreement on Trade-Related Aspects of Intellectual Property (TRIPs), 1994

The first rule based multilateral agreement for the protection of intellectual property in the form of Agreement on Trade Related Aspect of Intellectual Property Rights (TRIPs) emerged in 1994. Article 3 of the Agreement set out obligations for the member states to accord national treatment to the nationals of other Members, not less favourable than that it accords to its own nationals with regard to the protection of intellectual property. Similarly Article 4 provides for Most Favoured Nation Treatment Which means that with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. TRIPs adopts and supplements norms of Berne Convention and Rome Convention on many aspects.

4 Meaning of Copyright

Copyright is a legal concept, giving the creator of an original work exclusive rights on it, usually for a limited time. Generally, it is ‘the right to copy’, but also gives the copyright holder the right to be credited for the work, to determine who may adapt the work to other forms, who may perform the work, who may financially benefit from it and other related rights. It is a form of intellectual property (like the patent, the trademark and the trade secret) applicable to any expressible form of an idea or information that is substantive and discrete.¹⁴ Copyright is an area of law that deals with the intangible property—property that a person cannot touch or hold or lock away for safekeeping. If one writes a personal letter to a friend, the person who receives the letter owns the piece of paper containing some words. The letter is the personal property of the receiver and the law protects it. But the writer retains the ownership of the words and the words are protected by copyright law. It means the receiver can destroy the letter or throw it away, but cannot publish the letter without writer’s permission, because the writer has copyright over the words written in the letter.¹⁵ First statute to give recognition to copyright was the ‘Statute of Eight Anne’ which was passed by the British Parliament in 1710. The Act recognized labour of the creator and it was an assurance for rewarding the creators so as to encourage them to create books, plays and arts.¹⁶

Indian Copyright Act 1957 states that copyright means ‘the exclusive right to do or authorize the doing of any acts, with regard to the work which forms the subject matter of copyright enumerated therein’. These acts include, among others the reproduction, circulation in public, performance and communication in public, translation or adaption or making a film, or sound recording, in case of literary, dramatic, artistic, or musical work and in addition to the previously mentioned uses, the sale or giving on commercial rental also, in case of computer programs or cinematograph films.¹⁷ Nepalese Copyright Act, 2002 offers no specific definition of copyright it rather provides definition of the term ‘Work’ which means any work presented originally and intellectually in the field of literature, art and science and in any other field, and it also includes book, pamphlet, article, thesis, drama, dramatic-music, dumb show and a work prepared to perform in such manner, musical notation with or without words, audiovisual works, architectural design, fine arts, painting, work of sculpture, work of woodcarving, lithography and other work relating to architecture, photographic work, work of applied art, Illustration, map, plan, three-dimensional work relating to geography, and scientific article and work and computer program. According to Section 3 of the copyright Act, copyright may be extended to any work.

¹⁴ Available at: <http://en.wikipedia.org/wiki/Copyright> [accessed on February 23, 2013].

¹⁵ *Supra* note 4, at 498.

¹⁶ *Id.*, at 505.

¹⁷ The Indian Copyright Act, 1957, section 14.

5 What Can or What Cannot Be Copyrighted

Copyright signifies the exclusive right given to the author or owner to reproduce the copyrighted work in any form.¹⁸ If any unauthorized person is found involved in reproduction, distribution, display and public performance, he is deemed to have infringed the copyright and is subjected to fine and punishment. There are six exclusive rights given to the owner and are prohibited acts for people other than the owner:

- Right of reproduction of work
- Right of preparation of derivative works
- Right of public distribution of work
- Right of public performance of the work
- Right of public display of the work
- Right of public digital performance of a sound recording.

Printing and distribution of copyrighted work without permission of the author or owner undoubtedly infringes the copyright law, because such acts violate the exclusive printing, reproduction and distribution rights of the owner. The issue becomes complex when the same is done using the computer and internet. Whether the storing of a copyrighted work in the hard disk or a diskette or even in the computer RAM violates the exclusive right of the copyright owner? And whether transmitting a copyrighted work via Internet violates the exclusive right of public performance or distribution? These are some of the very important questions which need clear answer under the Nepalese law.

In *Playboy Enterprises Inc. v. Starware Publishers Corporation*,¹⁹ it is ruled that it can be an infringement of copyright to download material off the internet or unauthorized use or upload copyrighted material on a website or bulletin board without the permission of the copyright holder.²⁰ Therefore, if any online service provider subscribes to unauthorized copies of the copyrighted images, he infringes the copyright holder's right of reproduction, distribution and display.²¹ Thus, before a copyrighted work is printed, broadcasted, dramatized or translated, the permission of the owner must be obtained.

The copyright law is not only concerned with what could be copyrighted, but is equally concerned with what cannot be copyrighted. Under the copyright law, following²² cannot be copyrighted:

¹⁸*Supra* note 4, at 498.

¹⁹900 F. Supp. 433.

²⁰*Supra* note 4, at 506.

²¹*Ibid.*

²²*Id.*, at 508.

- Trivial materials cannot be copyrighted. Such thing as titles, slogans and minor variations on works in the public domain is not protected by the law of literary property.
- Ideas are not copyrighted. The law protects the literary or dramatic expression of an idea, such as script, but does not protect the idea itself.
- Utilitarian goods those exist to produce other thing are not protected under copyright law.
- Methods, systems and mathematical principles, formulas, and equation cannot be copyrighted. But a description, an explanation, or an illustration of an idea or system can be copyrighted.

Nepalese Copyright Act, 2002 has also adopted the above exclusions. The Act states that copyright protection is not available to any thought, religion, news, method of operation, concept, principle, court judgment, administrative decision, folksong, folktale, proverb and general data despite the fact that such matters are expressed or explained or interpreted or included in any work.²³

6 Important Provisions of Copyright Act, 2002

The Copyright Act 2002 was enacted to bring the law in line with various international conventions. Some of the important aspects of the Act have been discussed below.

- (a) Protection of copyright: the Act provides that copyright protection shall be extended to any work.²⁴ Any translation, arrangement, sequential arrangement of work or collection of works presented as original from viewpoint of presentation, collection or expression, data or database readable with or without support of machine, any proverb, folktale, folk song falling under folk expression or any other derivate works based on folk expression shall be protected as original work, without prejudice to the copyright of the original work.
- (b) Non-availability of copyright protection: according to section 4 of the Act, copyright protection shall not be extended to any thought, religion, news, method of operation, concept, principle, court judgment, administrative decision, folksong, folktale, proverb and general data despite the fact that such matters are expressed or explained or interpreted or included in any work.
- (c) Registration not compulsory: Registration of a work, sound recording, performance or broadcasting is not mandatory under this Act.²⁵ Person who intends voluntarily to get any work, sound recording, performance or broadcasting registered may make an application to the Registrar for the registration.

²³The Copyright Act, 2002, section 4.

²⁴Ibid.

²⁵*Id.*, section 5 (1).

- (d) Economic and Moral Rights: The Act provides for economic and moral rights to the author. The economic rights may be vested on persons such as co-author, person or organization at whose direction the work has been prepared, the person or organization providing remuneration for such work, the publisher for an anonymous work and producer of an audiovisual work. Economic right includes the following: reproduction, translation, revise or amendment, make arrangement and other transformation in the work, sell, distribution or rent the original and copy of the work for the general public, transfer or rent the right of audiovisual work, import copies of the work, public exhibition of the original or copy of the work, perform the work in public, broadcast the work and communicate the work to the general public.²⁶ The Act provides for authors' moral rights,²⁷ rights of performer,²⁸ rights of sound recording producers²⁹ and rights of broadcasting organizations.³⁰ The Copyright Act makes the provision for term of protection of copyright.³¹ According to the provision contained in section 14 of the Act, the economic and moral rights are available to the author for his life time and 50 years after death.
 - (e) Section 17 and 18 contain the provision for citing and reproducing the work without authorization. The Act provides for the provision of Infringement of protected rights³² and section provides for the punishment if protected rights have been infringed. The registrar is entrusted to do as follows³³:
- (a) to monitor and control the royalty collecting body,
 - (b) to hear complain as prescribed made by any party who is not satisfied with the royalty fixed by the royalty collecting body,
 - (c) to perform, or cause to be performed such other functions as prescribed for the accomplishment of the objective of this Act.

7 Problems Related to Copyright Law in Nepal

The concept of copyright was introduced with the enactment of the copyright Act in 1965. But, it was neither made known to the stakeholder nor implemented properly. The provisions of Copyright Act are frequently violated. Consequence of such violation is often resulted in neglecting the right of author. In this context, one

²⁶*Id.*, section 7.

²⁷*Id.*, section 8.

²⁸*Id.*, section 9.

²⁹*Id.*, section 10.

³⁰*Id.*, section 12.

³¹*Id.*, section 14.

³²*Id.*, section 25.

³³*Id.*, section 30.

needs to identify some of the common problems associated with copyright law in Nepal:

- (a) Lack of awareness on copyright: Neither the copyright owners or authors themselves nor the users of the copyrighted work are very much aware about their rights In absence of proper implementation of copyright law people are ignorant of the provision of the copyright Act. The body established for implementation of the copyright law is not successful in creating awareness about the law.
- (b) Tendency of using the work without taking permission: we lack the tendency of getting permission from the author or the owner for the reproduction of the copyrighted works. There is no monitoring system of unauthorized use of the work although registrar is obliged under the Act to perform these duties.
- (c) No control of piracy and infringement of copyright: although the Copyright Act provides for punishment for acts of infringement of the copyright yet crimes related to copyright are increasing.
- (d) Lack of knowledge about the copyright on the part of implementing agencies: Copyright registrar's office is the concerned authority for the effective implementation of copyright law. The office should have the efficient human resource equipped with the technical knowledge about copyright. But this office entrusted for the implementation lacks the skilled human resources and other resources.
- (e) Lack of separate policy on copyright: There is no separate policy to make the copyright law more effective. Besides the Act and Regulation on copyright, a separate policy needs to be adapted to make monitoring and implementation effective.
- (f) Adjudication of copyright related dispute by ordinary court: It is a problem in itself that the copyright related disputes are adjudicated in the district court. District court is an ordinary court where there is no skilled human resource on copyright. Unless the disputes are settled by the person having specific knowledge, the decision may not fulfil the objectives of the law. Therefore, copyright-related disputes need to be settled by mediation or arbitration.
- (g) No clear cut provision on compensation to owner: Section 27 of the Copyright Act provides the punishment for infringement of protected rights. Any person who infringes the copyright according to section 25 shall be punished under section 27. The section provides for fine of a sum from ten thousand to one hundred thousand rupees or with imprisonment for a term not exceeding 6 months or both and twenty thousand to two hundred thousand rupees or with imprisonment for a term not exceeding 1 year or with both if the same offence is repeated and the materials so published or reproduced or distributed or devices used to reproduce such materials may be seized. But there are no provisions on compensation to the owner.

8 Conclusion

As copyright law in Nepal is not very old, it is less known among the stakeholder and the common people. Despite the strong legal provisions, copyright law is not effectively implemented. At the statutory level, Nepal to some extent has been trying to comply with modern norms of copyright. Moreover, Nepal as a member of WTO has obligation to follow the norms of the TRIPES Agreement on copyright. But, a number of the problems still exist regarding the implementation of copyright law, particularly the indifferent approach of the authority responsible for its implementation. Despite enactment of the Copyright Act, 2002, the problem of implementation continues.

India is the largest supplier of the education materials in Nepal. It is strongly felt that the two countries come together on the issues of copyright for the benefit on Nepal, it becomes even more important in the light of the fact that the international border between two countries is not closed. Tremendous growth in science and technology has made production and reproduction of work by electronic devices very common. Such activities often result in infringement of copyright. From the Nepalese perspective, the author argues to develop a regional convention providing the detailed guideline about rights, liabilities and remedies in the context of copyright.

Chapter 22

Communication to the Public Under Copyright Law and the Impact of Information and Communication Technologies: An Analysis

M. Sakthivel

1 Introduction

The main aim of copyright is dissemination of knowledge or information to the public.¹ In earlier days, copyright was only available to the literary works. Therefore, the only way to communicate the work to the public was by issuing copies of work to public. When the dramatic works and musical works were included for the copyright protection, new mode of dissemination of works including public performance was envisaged. It is the nature of these new subject matters which caused the changes to happen. For enjoying these works, people had to come together where the works were intended to be performed. Communication by way of public performance was widely known as ‘Communication for the public’ or ‘Communication in the Public’. The concept of communication to public was replaced by technological advancements, such as, music sheets and radio broadcast. These technological developments enabled the public to enjoy the copyrighted works without joining or assembling at a place.

Though the people were not joining together for enjoying the content in the era of radio and TV broadcasting, the transmitted contents were same for all. The only change that took place through these technologies was that the audience can choose the place where they want to enjoy the content. When the copyright penetrated into the digital world, major changes took place. In the Internet context, on-demand services are very popular. It enables the audience to shift the time and place. Moreover, choosing the content is also possible in the digital context. In relation to

¹Even the first copyright legislation of the world i.e., Statute of Anne had been titled as “An act for the Encouragement of Learning, by vesting the copies of printed books in the Authors or purchasers of such copies, during the time therein mentioned”. The Act was enacted in order to encourage the people to gain knowledge by way of regulating printing industry.

digital technology, it is inevitable to trace justifications for accommodating these technologies into copyright. It is in this context that the present chapter focuses on the issue of accommodating the concept of ‘communication to individual’ within the meaning of ‘communication to public’ in copyright law. It has been done through a socio-economic study of each technological advancements so as to understand the reason behind such changes in the copyright law.

The chapter argues that technological advancements and the associated market or economic factor shifted our focus from the concept of the communication to the public to individual communication.

2 From Analogue to Digital—Technological Revolution and Communication to Public

In the beginning of the nineteenth century, the mode of communication of the copyrighted work to the public widened due to the advent of phonogram records or musical sheets.² The wireless communication technology invented during the mid-nineteenth century³ further expanded the meaning of communication. By the mid-1920s, the radio broadcasting industry had grown and was flourishing. There was a strong competition between many radio stations. As a result, they started to play new and popular music of the time, which were protected by copyright. It created problems between copyright owners and broadcasters.⁴ The same led to some important changes done in the definition of ‘communication of the work to the public’. This new technology not only had considerable impact on the cultural life of the public but was also the main reason for widening the scope of copyright protection against communication to the public.⁵ This technology enabled the public to assemble at a place for the purpose of enjoying the contents when it was introduced, due to the high price of radio equipments.

However, when the radio sets started becoming available at low price, it became possible for most of the people to buy radio sets and enjoy the news and other copyrighted contents at their homes or work places rather than assembling at a common place. The same radio diffusion technology was adopted for the television

²For the detailed discussion about the expansion of copyright to the records and sheets, See Sidney A. Diamond, “Sound Recordings and Phonorecords: History and Current Law”, 13 *Intellectual Property L. Rev.* 415, 1981 and also See for the same Makeen Fouad Makeen, *Copyright in a Global Information Society: The Scope of Copyright Protection under International, US, UK and French Law* (Kluwer Law International, London, 2000) at 35.

³For the detailed discussion on the way in which wireless communication was developed in the 19th century See http://en.wikipedia.org/wiki/History_of_radio, [accessed on February 6, 2013] and also See Makeen Fouad Makeen, Ibid.

⁴Ibid.

⁵Ibid.

broadcast.⁶ Since the technology was one and the same, in both radio and TV broadcast, the same type of impact was created by the TV broadcast in the society. The content transmitted through both the above transmissions remained same for all. In other words, the consumers remained as passive audience because of the push technology. As a result, from the user's point of view, whether they like the content or not, they were forced to here the content, if they do not want, they could switch over to another channel. This was the only option available to the viewers/users.

Satellite transmission of the TV signal is considered as another milestone in the communication revolution. Through the satellite, live simultaneous transmission of a TV broadcast by using analogue transmission methods around the world or a particular region without the help of amplifiers was made real.⁷ According to some authors, satellite transmission is not to be considered as public broadcasting since public cannot receive this satellite transmission without the help of a distributor.⁸ As a result of satellite transmission, cable broadcasting emerged.⁹ The main advantage of the cable broadcasting is the possibility of avoiding external influences¹⁰ such as hill, air, mountain, weather, etc. Therefore, quality of contents is high. At the end of the twentieth century, tremendous changes occurred in the terrestrial analogue communication technology. Contents are digitalized and then transmitted through various modes. A new technology namely, Internet-based transmissions emerged that resulted in development of individual communications along with public communication.

3 Digital Transmissions and Communication to the Public

Digitalization of contents means that the contents are compressed and encrypted with the help of specific software and then they are converted into small packets. These packets are transmitted to a streaming server with the help of Internet Protocol (IP). In the analogue transmission, contents are transmitted without reducing their size. However, in the digitalization process, size of the content is

⁶*Id.*, at 175.

⁷Ibid., for the detailed discussion about the Satellite Broadcasting Technology see Megumi Ogawa, *Protection of Broadcasters' Rights* (Martinus Nijhoff Publishers, Boston, 2006) at 64; In addition to these references, See "Socio Economic Dimension of the Unauthorized Use of Signals: Current Market and Technology Trends in the Broadcasting Sector", *Standing Committee on Copyright and Related Rights*, nineteenth Session, 2009, at 11, available at: www.wipo.int/edocs/mdocs/copyright/en/sccr_19/sccr_19_12.doc, [accessed on February 6, 2013].

⁸See for the same type of argument Megumi Ogawa, *Ibid.*

⁹*Id.*, at 176.

¹⁰Standing Committee on Copyright and Related Rights, *supra* note 7 and also see Makeen Fouad Makeen, *supra* note 2, at 227.

reduced by using compression method. There after the server regulates the delivery of the packets.¹¹

The delivery of packets can be done by way of using network, cables or wireless modes. After decrypting and decompressing, the user's Personal Computer (PC) or Television (TV) or Mobile Phones will play the contents.¹² In order to decrypt and decompress the received packets, the users should have PC or Laptop or set-top box. All these platforms are equipped to do the same. If they use a computer or a laptop, their platform will automatically decompress and decrypt the packets. The enjoyment of content can be either in the form of streaming or in the form of downloading process. If the end users want to enjoy the content on the TV screen, they need to have set-top boxes which can decompress and decrypt the received packets. Then it allows them to enjoy the content with the help of TV. This mode of transmission is known as Internet Protocol Television (IPTV).¹³ Another feature is that the packets can be converted into analogue digital signals for satellite or wireless transmission in order to receive the contents through mobile devices and other electronic devices. This model is currently employed by the mobile service operators.

4 Technological Advancements and Communication to the Public: Analysis

As a result of the new technological revolution, the concept of communication to public is changing and has been considerably substituted by individual communication. Before the wireless broadcasting, people joined together at one place in order to enjoy the copyrighted content, i.e. public performance. The old concept of public performance was modified by the wireless broadcast when new receiving equipments were developed. This enabled the people to enjoy the copyrighted contents from their homes. In addition to this, satellite transmission allowed the distribution of contents to a single person for further distribution.¹⁴ In the beginning broadcasting to a single person by satellite transmission was not possible.

¹¹For the elaborate discussion about the Internet transmission see Michael Nwogugu, "Economics of Digital Content: New Digital Content Control and P2P Control Systems/ Methods", *Computer and Telecommunications Law Review*, 2008, pp. 140–141; See for the same <http://www.peer-to-peer.arnollo.com/p2pgens.html>, and also see http://cmogen.com/sc_blog/?p=4#more-4 [accessed on February 6, 2013].

¹²Ibid.

¹³Internet Protocol Television enables the households to receive the contents with the help of set-top boxes by using Internet Protocol. This IPTV transmission may take place by way of cable or telephone IP connections. Set top boxes have been programmed to decode the encoded contents then allow the households to receive and enjoy it.

¹⁴Most of the cable distributors are receiving the signals from the satellite and distributing the same to the public.

However, at the later point of time, due to the advent of set-top boxes and dishes, individuals become capable of receiving the content directly from the satellite. The method of individual broadcasting becomes possible because of the cable broadcasting. It metamorphosized the focus of public communication from public performance to individual communication. Distribution of the content can very well be restricted in the cable broadcasting. In most of the terrestrial analogue transmission, interaction with the content provider is not possible. The consumer has no choice but to view it at the time of transmission. But the new technology facilitated the interaction in case of cable transmission and satellite transmission which uses set-top boxes.

The digital communication modes enable the end users to have interaction with the broadcasting organizations. It means clients can have an option to select a programme which they want to receive. This technology has introduced on demand, pay-per view concepts. This also changed the traditional role of broadcasting organizations from the transmission of signals to the users on a specified time to that of providing content not only at the time of transmission but also at the request of consumers that too to individual users at their convenience. Use of internet for transmission of content further expanded the scope of communication of the copyright content. This led to the emergence of streaming, downloading and other newer modes of digital transmission. Thus, the traditional broadcasting organization in the digital context using Internet as a means of communication has the possibility of undertaking different economic activities associated with copyright content.

Chapter 23

Arbitration for Intellectual Property Disputes: Problem of Mutually Exclusive Development of Laws

Rajnish Kumar Singh

1 Introduction

Alternate Dispute Resolution (ADR) and Intellectual Property Rights (IPR) form the subject matter of the present chapter. In contemporary international trade and commerce an individual, a private firm or an incorporated firm, national or multi-national, extensively participates in transnational commercial activities.¹ Such a transnational commercial transaction may be either with another sovereign State, its agencies or instrument or a national, natural or juristic person of another state. During the past few decades, international trade and commerce has resulted in internationalization of the market which induces greater potentialities for generating international trade disputes.²

The growing importance of technology in the production of goods leading to the creation of high-tech industries has made patent protection for the innovation an important legislative tool. In the same fashion, a trader's desire to promote a market image across national boundaries in globalized markets has increased the importance of trademarks law and emergence of digital technology has increased the importance of copyright laws. The increasing importance of intellectual property assets and the territorial nature of Intellectual Property Rights (IPRs) clubbed with the growing importance of contracts between content creators and users compel us

¹See Gus van Harten, “The Public-Private Distinction in the International Arbitration of Individual Claims against the State”, 56(2) *International and Comparative Corporate Law Quarterly*, 2007, pp. 371–394; James R. Markisen, “Integrating Multinational Firms into International Economics”, *NBER Reporter*, Winter 2001/2002.

²K.I. Vibhute, “Settlement of International Trade Disputes Through Litigation and Arbitration: A Comparative Evaluation”, *Arbitration*, 1998 at 125.

to assess the state of intellectual property (IP) dispute resolution mechanism in place.

Another area of law which has experienced huge growth in last few decades is the law of Alternative Dispute Resolution (ADR). High costs and long delays involved in litigation have made it a less preferred option. The transnational nature of disputes also adds to the troubles of the litigants. It may also be argued that keeping in view the technicalities of science and technology involved in modern disputes courts may not be properly equipped to provide quick and effective remedies. These factors have all fostered the growth of extrajudicial dispute settlement procedures. It is in this background that the applicability and utility of ADR in general and arbitration in particular for resolution of IP disputes have been examined in the present chapter. It has been divided into five parts with the second and third parts providing the background by explaining the nature of IP disputes and meaning and advantages of ADR and particularly arbitration. Part four brings to fore the discussion on arbitrability of IP disputes with focus on three important aspects: arbitrability, law applicable for contractual disputes and law applicable to non-contractual disputes.

2 Nature of IP Dispute

The past 15–20 years have witnessed a proliferation in cross-border disputes relating to the enforcement of intellectual property rights. Indeed, infringements of IP rights are increasingly international in scope. This is probably due to a mixture of concurrent factors such as the globalization of business and commerce, the increasing role of parallel traders, and the never-ending expansion of the Internet and other communication technologies.³

As a general principle, intellectual property rights are territorial in scope.⁴

The right in each country is determined by the law of that country and is independent of equivalent rights governing the same subject matter such as an invention or trade mark in other countries.⁵ IP rights are primarily derived from the legal protection granted by the national sovereign power, which affords the grantee certain exclusive rights to use and exploit those IP rights. It has thus been argued

³Riccardo Sciaudone, “Dealing with IP Matters in Cross-Border Cases”, 8(4) *Journal of Intellectual Property Law & Practice*, 2013, at 332.

⁴See generally Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994; Lionel Bently and Brad Sherman, *Intellectual Property Law*, (Oxford University Press, First Indian Edition, 2003); Hanns Ullrich, “TRIPS: Adequate Protection, Inadequate Trade, Adequate Competition Policy”, 4(I) *Pacific Rim Law & Policy Journal*, 1995; Curtis A. Bradely, “Territorial Intellectual Property Rights in an Age of Globalism”, Territoriality Panel Principle Paper, 37 *Virginia Journal of International Law*, 1997, pp. 505–586.

⁵William R. Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: Patents, Copyright, Trademark and Allied Rights*, (Sweet and Maxwell London, 7th edn., 2010) at 35.

that disputes concerning the validity of IP rights should only be decided by a state authority or by state courts.⁶

IP rights are hot commodities which are sometimes in short supply. Many products cannot be merchandized without the consent of another patent holder. Patent protections frequently overlap, such that a single technology can infringe dozens or even hundreds of separately held patents. The phenomenon of holdouts in licensing and the resultant solution of patent pools⁷ are very significant. IP thus in most of the cases involves collaboration. Without an environment of cooperation, innovation will be stifled and so will the economic benefits that are derived from it.⁸ Territoriality has an uncertain effect on the pursuit of an intellectual property issue in different jurisdictions. Equally, it unsettles the correlative question: may a plaintiff bring a civil action in an English court for infringement committed in a foreign jurisdiction?⁹ Intellectual property licensing contracts generally involve parties from different countries. These contracts may involve the laws and courts of several countries, which creates ambiguity in terms of the governing law and proper jurisdiction.¹⁰

Disputes involving IP issues often present unique challenges. Generally, they have some international dimension, they will usually, but not always, be based on some statutory IP right. An example may be the Internet domain name disputes which are not based on any statutory right. While many disputes arise in the context of an existing contractual relationship, they typically involve allegations of infringement by a defendant which is not in a contractual relationship. Further in many infringement proceedings, there will often be a public policy dimension potentially limiting the arbitrability of subject matter, specifically the extent to which an arbitral tribunal can determine for example the validity of a patent or the extent of concurrent rights to the use of a trade mark. However, in contractual disputes such as those concerned with the construction of licences, there is often little difference between the issues arising in IP disputes and those in any other commercial dispute.¹¹

⁶Patrick Rohn and Philipp Groz, "Drafting Arbitration Clauses for IP Agreements", 7(9) *Journal of Intellectual Property Law & Practice*, 2012, at 653.

⁷Patent pool is a consortium of at least two companies agreeing to cross-license patents relating to a particular technology. The creation of a patent pool can save patentees and licensees time and money, and, in case of blocking patents, it may also be the only reasonable method for making the invention available to the public. *International Mfg. Co. v. Landon*, 336 F.2d 723, 729 (9th Cir. 1964).

⁸Peter Jabaly, "IP Litigation or ADR: Costing Out the Decision", 5(10) *Journal of Intellectual Property Law & Practice*, 2010, at 731.

⁹William R. Cornish, *Intellectual Property: Patent, Copyright, Trade Marks and Allied Rights*, (Universal Law Publishing Co. Pvt. Ltd., Second Indian Reprint, 2003) at 77.

¹⁰Bashar H. Malkawi, "The Feasibility of ADR to Resolve IP Disputes in Jordan", 8(2) *Journal of Intellectual Property Law & Practice*, 2013, at 148.

¹¹James Bridgeman, "Arbitration or the Commercial Court? End Game Resolution of Intellectual Property Disputes in Ireland", *Arbitration*, 2010, at 627.

3 What Is Arbitration?

Alternative dispute resolution describes a range of techniques used to resolve disputes outside of the courts. Typically, ADR is informal and flexible and emphasizes ‘helping the parties help themselves’ reach a mutually beneficial resolution.¹² There is no generally admitted definition of ADR. The common denominator of all forms of ADR is that, compared with traditional court litigation, ADR is unconventional and flexible and hence leaves room for more innovative forms of dispute settlement. Its problem-solving atmosphere may also invite a greater preparedness of the parties to work towards a compromise.¹³ Various forms of ADR exist. As far as arbitration is concerned, there is some disagreement as to how it should be precisely classified, whereas some consider arbitration as a form of alternative dispute resolution (for example the World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre), others exclude it from its scope for the reason that arbitration is more rigid than other forms of ADR, such as mediation or conciliation, and lies in the hands of third-party neutrals who act akin to a tribunal and issue a binding decision.¹⁴ The present chapter considers arbitration as part of ADR having the essential benefits of ADR.

Arbitration is a private determination of the controversial issues by a neutral third party, who is empowered to make a binding award. It is a procedure in which the dispute is submitted to an arbitral tribunal which makes a decision (an award) on the dispute that is binding on the parties.¹⁵ Arbitration differs from court litigation in four basic features:

- i. An Alternative to Court Litigation: Court litigation is controlled and administered by the courts and maintained by the state. It is a manifestation of the power and responsibility of the sovereign power of the state to provide fora for settlement of disputes between the parties and between the parties and the state. These fora are headed by appropriately qualified judges appointed by the state in accordance with the procedural rules, to regulate the basis of jurisdiction and conduct the litigation before them.
- ii. A Private Dispute Resolution Mechanism Agreed Upon: Arbitration legislation permits the parties, to agree to refer their disputes to arbitration by a private person. In contrast to the public nature of court litigation, arbitration is a private matter between the parties.

¹²Julia A. Martin, “Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution”, 49(4) *Stanford Law Review*, 1997, at 919.

¹³Brigitte Lindner, “Alternative Dispute Resolution—A Remedy for Soothing Tension Between Technological Measures and Exceptions?”, in Paul Torremans (ed.), *Copyright Law—A Handbook of Contemporary Research* (Edward Elgar, 2007) at 431.

¹⁴*Id.*, at 432.

¹⁵Madabhushi Sridhar, *Alternative Dispute Resolution Negotiation and Mediation*, (Lexis Nexis Butterworths, 2006) at 99.

- iii. Agreed and Controlled by the Parties: The most important feature of arbitration is party autonomy. In other words, the parties have ultimate control of their dispute resolution system by arbitration. The parties have the ultimate power to determine the form, structure, procedure and other details of the arbitration.
- iv. Final and Binding Determination of Rights and Obligations of the Parties: The arbitral award is final and binding on the parties and the parties claiming under them, respectively. And such award is enforceable under the Code of Civil Procedure 1908 as it was a decree of court.

There are two principle reasons for supporting arbitration over court litigation. First, arbitration gives the parties an opportunity to choose a ‘neutral’ forum and a ‘neutral’ tribunal. Second, arbitration—if carried through the end—leads to a decision which is enforceable against the losing party not only in the place where it is made but also internationally, under the provisions of such treaties as the New York Convention.¹⁶ There are other reasons that make arbitration an attractive option to litigants in particular, the flexibility of arbitral proceeding and the confidentiality of the arbitral process.¹⁷ Arbitration is also attractive to parties in disputes involving highly technical or specialized subject matter because with arbitration, parties can select a knowledgeable arbitrator and design and control the procedures by which their dispute is settled.

The American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR) states¹⁸:

“The advantages of arbitration over litigation for these types of cases are relative speed and economy, privacy, convenience, informality, reduced likelihood of damage to ongoing business relationships, more suitability to international problems, and, especially important, the ability of the parties to select arbitrators who are experts and familiar with the subject matter of the dispute.”

A survey undertaken by Queen Mary University Law School in London and first published in 2006 concluded that, for the resolution of cross-border disputes, ‘73% of respondents prefer to use international arbitration, either alone (29%) or in combination with Alternative Dispute Resolution (ADR) mechanisms in a multi-tiered dispute resolution process (44%)’, and that ‘the top reasons for choosing international arbitration are flexibility of procedure, the enforceability of awards, the privacy afforded by the process and the ability of parties to select the arbitrators’.¹⁹

¹⁶Alan Redfren et al. (ed.), *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell, South Asian Edition, 4th ed., 2006) at 22.

¹⁷*Id.*, at 23.

¹⁸American Arbitration Association, available at: <http://www.adr.org/sp.asp?id=28818> [accessed on July 20, 2013].

¹⁹“Introduction to ICC Arbitration”, *International Chamber of Commerce*, available at: <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/> [accessed on July 12, 2013].

International arbitration has become the established method of determining international commercial disputes. All over the world, states have modernized their laws of arbitration to take account of this fact.²⁰

In 1996, India enacted the Arbitration and Conciliation Act (the Act) with the professed objective of facilitating the recognition and enforcement of foreign awards covered under the New York Convention.²¹ Part II of the Act was specifically designed as a sign of positive reassurance to foreign investors that the ‘enforcement mechanism for foreign arbitral awards will be comparatively quicker and clearer and more in line with the New York Convention’.²² A survey of the salient features of Arbitration law in Indian context is not out of place.

3.1 Party Autonomy and Neutrality

The arbitration procedure is driven by ‘party autonomy’, that is choices made by the parties themselves about how they want the dispute to be dealt with. Along with party autonomy, concern for procedural flexibility finds expression under the Act’s scheme, as arbitral tribunals are not bound by the 1908 Code of Civil Procedure or the Indian Evidence Act of 1872.²³ Moreover, the parties are free to agree on the following: the place of the arbitration,²⁴ the language or languages to be used in proceedings,²⁵ and the procedure to be followed by the tribunal in conducting its proceedings.²⁶ Substantially amplifying the powers of the arbitrator, the Act provides that in absence of any agreement between the parties, the tribunal may do the following activities: conduct the proceedings in the manner it considers appropriate,²⁷ decide upon the place of arbitration,²⁸ determine the language or languages to be used in the arbitral proceedings,²⁹ appoint experts,³⁰ determine the law to resolve the dispute,³¹ seek the court’s assistance in taking evidence and award interest.

²⁰William R. Cornish, *Supra* note 9, at 1.

²¹Statement of Objects and Reasons to the Arbitration and Conciliation Bill, 1995 para 4(ix).

²²Raghav Sharma, “Sanctity of Foreign Awards: Recent Developments in India”, *Arbitration*, 2009, at 148.

²³The Arbitration and Conciliation Act, 1996, Section 19(1).

²⁴*Id.*, Section 20(1).

²⁵*Id.*, Section 22(1).

²⁶*Id.*, Section 19(2).

²⁷*Id.*, Section 19(3); According to Section 19(4), the power of the arbitral tribunal under subsection (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

²⁸*Id.*, Section 20(2), in deciding upon the place of arbitration, the tribunal is required to have regard to the circumstances of the case, including the convenience of the parties.

²⁹*Id.*, Section 22(2).

³⁰*Id.*, Section 26.

³¹*Id.*, Section 28.

While parties have greater freedom under the Act to determine procedure, the Act also contains express provisions aimed at thwarting obstructive tactics adopted by parties in arbitration proceedings. Thus, the Act provides that a party who knowingly kept silent will not be allowed to suddenly raise a procedural objection. The Act gives a prime place to party autonomy in domestic as well as international commercial arbitration in all jurisdictions. The combination of Section 18 and 19 goes a long way in establishing procedural autonomy by recognizing the parties' freedom to lay down the rule of procedure. These provisions regarding conduct of arbitration proceedings provide a liberal framework to suit the great variety of needs and circumstances of international cases unimpeded by local peculiarities and traditional standards, which may be found in the existing system of national law of place. The choice of substantive law is very important in the realm of international commercial contract. The parties to a contract have the freedom to choose the law governing an international agreement. An illustration of the importance of choice is the case of substantive law in international construction contracts for which it is extremely important to decide whether the laws of the exporter's/contractor's country or the laws of the country where the construction is carried out apply.³² The Act grants full autonomy to the parties to designate the rules of law as applicable to the substance of the dispute.³³ The Act provides further support to the party's freedom to choose the law of any country that they wish to be applied to their dispute by determining that any chosen law or legal system has to be construed, unless otherwise expressed as 'directly referring to the substantive law of that country and not to its conflict of law rules'.³⁴ Court litigation in transnational matters generally has to take place in the courts of one of the parties to a dispute; international arbitration is nationally neutral in the sense that there does not need to be a link between any party's place of incorporation or residence and the place of the arbitration.

3.2 Confidentiality and Finality of Awards

Arbitration proceedings and hearings are completely private. Only the arbitrators and the parties (including their lawyers) are permitted to attend, not the general

³²Rodney D. Ryder, "Contracts, the Choice of Law and International Commercial Arbitration", 2 *Company Law Journal*, 1999, at 9.

³³The Arbitration and Conciliation Act, 1996, *supra* note 24, Section 28(1)(b)(1): Rules applicable to substance of dispute.—where the place of arbitration is situate in India—in international commercial arbitration—the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.

³⁴*Id.*, Section 28(1)(b)(3): Rules applicable to substance of dispute—where the place of arbitration is situate in India - in international commercial arbitration—in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

public. A final and enforceable outcome can generally be achieved only by recourse to the courts or by arbitration. Section 35 provides that subject to this Part, an arbitral award shall be final and binding on the parties and persons claiming under them, respectively. Section 36 accords an arbitral award, the status of a decree. The section says, ‘where the time for making an application to set aside the arbitral award under Section 34 has expired, or such an application having been made, it has been refused such award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court’.

3.3 Recognition and Enforcement of Awards

Arbitral awards enjoy much simpler international recognition than court judgments. Some 145 countries have signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’).³⁵ A foreign award can be enforced in India under the multilateral international conventions, the New York Convention and the Geneva Convention, subject to two reservations. First, the award must have been made in a country which has ratified either the New York or Geneva Convention and which has made reciprocal provisions for the enforcement of Indian awards in its country. Second, only those awards which concern differences arising out of legal relationships, considered ‘commercial’ under Indian law, may be enforced. The Supreme Court declared in *Fuerst Day Lawson Ltd. v. Jindal Export Ltd.*,³⁶ held that for enforcement of a foreign award, there is no need to take separate proceedings, such as one for deciding enforceability of award to make it a rule or decree of the court and another to take up execution thereafter.

Intellectual property disputes generally involve lengthy proceedings, tremendously costly and resource demanding and provide one-sided outcomes. Arbitration allows parties to bypass the backlogged judicial system. Arbitration can start immediately and parties can control the arbitration process. Flexibility exists in selecting arbitrators and procedures thus reducing time and saving money for the parties involved.³⁷

As arbitrators are usually experts in the field occupied by the dispute, there is less squabbling over the qualifications of expert witnesses, less argument over admissibility of evidence and less contention over the validity of experiments and models used as demonstrative evidence. Especially in the case of complicated patent-related disputes, rules giving the arbiters broad discretion in determining

³⁵The text of New York Convention is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html [accessed on July 20, 2013].

³⁶AIR 2001 SC 2293, the court mentioned, ‘once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again’.

³⁷Bashar H. Malkawi, *supra* note 10, at 153.

the ‘admissibility, relevance, materiality, and weight of evidence’ and the ability to review experiments on its own motion and visit sites are all factors that can reduce cost.³⁸

4 Arbitration for Intellectual Property Disputes

Arbitration is a creature of contract. This bedrock principle of arbitration can, however, sometimes lead to difficulties in the context of international intellectual property arbitration cases because these cases frequently raise issues that go beyond standard breach of contract claims. Unless this is clearly expressed in the arbitration clause, the argument can thus be made by the opposing party that such non-contractual claims fall outside the scope of the arbitration clause and thus are beyond the power of the arbitral tribunal. This argument is of major practical significance, particularly because an award which would decide on an issue which would be beyond the power of the arbitral tribunal might not be enforceable under the New York Convention precisely for this reason.^{39,40} The non-contractual issues are typically claims based on an infringement of IP rights or on unfair competition, or claims concerning the validity or ownership of an IP right. It is also usually recommended to extend the objective scope of the arbitration clause to non-contractual claims. An arbitration clause stating, for example, that ‘disputes arising out of or in connection with the present contract’ is likely to be interpreted to also encompass non-contractual claims, while a narrower clause (such as ‘disputes arising under this agreement’) could provoke discussions as to whether the arbitral tribunal has jurisdiction to decide non-contractual claims. Model arbitration clauses of major arbitral institutions provide for a broad scope of arbitration clauses for future disputes.⁴¹ The recommended WIPO arbitration clause specifically mentions that the arbitration clause covers non-contractual claims.⁴²

³⁸Ibid.

³⁹The New York Convention, Article 5(1)(c) provides that the enforcement of the award can be refused if ‘the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced’.

⁴⁰Jacques De Werra, “Arbitrating International Intellectual Property Disputes: Time to Think Beyond the Issue of (non-) Arbitrability”, *International Business Law Journal*, 2012, at 306.

⁴¹Patrick Rohn and Philipp Groz, *supra* note 6.

⁴²Recommended WIPO arbitration clause: Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims.

Indian IP legislations and Arbitration law have developed in isolation and thus we do not find arbitrability of IP disputes in either of the legislation.⁴³ Thus one may conclude that essentially there is no legal bar for arbitration of IP disputes. Private parties can contract to settle their disputes through arbitration. Nevertheless, it remains unclear whether all issues involving intellectual property rights, including the validity of intellectual property or ownership of the rights, are arbitrable. One can assume that disputes relating to contractual rights and obligations, such as amounts of royalty paid in a licence agreement, scope of licence and guarantees, are arbitrable. This assumption is based on the fact that these are purely private issues pertaining to the interpretation of an agreement, and they are governed by a licensing agreement, rather than public interest issues, such as validity and revocation questions, that fall within the jurisdiction of the Patents office.⁴⁴ In relation to arbitration for IP disputes, important aspects have been examined below.

4.1 Arbitrability

Perhaps, the greatest limitation on the more frequent use of arbitration to resolve international IP disputes is the fact that the arbitrability of IP disputes is not universally recognized. While claims based on IP rights created by the acts of the rights holder itself (for example, trade secrets) generally do not present a problem of arbitrability, questions of arbitrability may arise with respect to IP claims based on rights created by the acts of sovereign states (in particular in the area of patents).⁴⁵

In order to adjudicate international intellectual property disputes by arbitration, it is necessary first to verify whether national/regional regulations do not require that the issues in dispute be subject to national/regional court adjudication, which in certain instances may be the case under existing regulatory regimes.⁴⁶ One of the areas of difficulty in the context of objective arbitrability arises in relation to the question of whether disputes about moral rights (which are generally held to be inalienable to the extent that they reflect the personality of the author) can also be subject to arbitration.⁴⁷ The issue may be answered in Indian context by referring to the case of *Mannu Bhandari v. Kala Vikas Pictures Pvt. Ltd.*⁴⁸ which relates to violation of moral rights of authors. In view of the settlement reached by the parties, the appellant withdraws the appeal pending in the court. It is submitted that

⁴³Except the Patent Act, 1970, Section 103.

⁴⁴Bashar H. Malkawi, *supra* note 10, at 150.

⁴⁵Joseph P. Zammit and Jamie Hu, “Arbitrating International Intellectual Property Disputes”, American Arbitration Association, Inc., Reprinted from the *Dispute Resolution Journal*, 2009, at 3.

⁴⁶Jacques De Werra, *supra* note 40, at 301.

⁴⁷Ibid.

⁴⁸AIR 1987 Del. 13.

arbitration should be permitted in relation to such issues on the ground that the exercise of moral rights can be the object of contractual agreements and are thus, at least partly, disposable by the author of the relevant work.⁴⁹

The jurisdictional powers of arbitral tribunals are generally considered to be limited when a dispute requires the arbitral tribunal to pass an award on the validity of registered intellectual property rights. Such questions may be problematic in most of the countries, whose legal regimes take the position that only the state authorities in the country of registration of such rights shall have jurisdictional power to decide on such issues.⁵⁰ In Indian law, Section 91 of the Trade Marks Act, 1999 provides that a person aggrieved by an order of the Registrar under the Act including the decision of the registration of a trade mark may prefer an appeal to the Appellate Board. Similarly, in Section 117-A of the Patent Act, 1970 it is provided that an appeal from the decision of the Controller of Patent and the Central Government shall lie before the Appellate Board. Further, Section 117-C provides that no court or any authority can entertain jurisdiction in relation to matters for which powers have been given to the Appellate board under Section 117-A. Above provisions sufficiently indicate that the scope of arbitrators power is limited when it comes to deciding validity of a registered intellectual property in India.

The American position on the issue is seen in the case of *Beckman Instruments, Inc. v. Technical Developments Corp.*, where the Seventh Circuit held that certain patent law issues were ‘inappropriate for arbitration proceedings and should be decided by a court of law, given the great public interest in challenging invalid patents’.⁵¹ However, U.S. patent laws allow the parties to submit to arbitration ‘any dispute relating to patent validity or infringement’.⁵² It is important to note that such an arbitration shall not bind third parties.

In relation to the above, a solution may be reached that an arbitral tribunal must always declare that its award shall only have an effect on the parties as far as the validity of an IP right is concerned. While the arbitrability issue should thus not deter parties from choosing arbitration as a dispute resolution mechanism, parties may be advised to agree on the seat of the arbitration in a country with a liberal approach to arbitrability of IP rights.⁵³

⁴⁹Jacques De Werra, *supra* note 40, at 131.

⁵⁰Ibid.

⁵¹433 F.2d 55, 63 (7th Cir. 1970); see also *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 F.2d 184, 186 (D. Del. 1930) (“The determination of a status of a patent, its validity or invalidity, its infringement or non-infringement, is a matter that is inherently unsuited to … arbitration …”). Quoted from Julia A. Martin, “Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution”, 49(4) *Stanford Law Review*, 1997, at 937.

⁵²35 U.S.C. §294(a); the “award shall be final and binding between the parties to the arbitration but shall have no force or effect on any other person.” 35 U.S.C. §294(c).

⁵³Patrick Rohn and Philipp Groz, *supra* note 6, at 653.

4.2 Law Applicable to Contractual IP Issues

All arbitrations are creatures of contract, existing either before a dispute arises or after. Having the contract in place before the problem arises is the preferred method of arbitration-based dispute resolution, though constructing the arbitration agreement after the problem has manifested itself is also an option. The latter approach is not often recommended because it is usually difficult to get parties to agree to a non-judicial mechanism after the problem has arisen, as somebody always thinks they have the upper hand in the litigation process.⁵⁴

Intellectual property licensing contracts generally involve parties from different countries. These contracts may involve the laws and courts of several countries, which create ambiguity in terms of the governing law and proper jurisdiction. Accordingly, one of the primary reasons for including a contractual clause mandating ADR rather than litigation of any intellectual property dispute is to provide the parties with the certainty that, in the event of a dispute, they will be submitting their dispute to a single forum for resolution rather than potentially to several different forums in different jurisdictions. Without such an arbitration provision in the contract, one party may file a law suit in each of the several different jurisdictions having power to apply its laws to the parties or contract at hand.⁵⁵

The suitability of arbitration as a prompt and effective means of resolving intellectual property disputes has been well recognized in the United States since enactment in 1983 of the arbitration section of Public Law 97-247 (35 USC 294). This section specifically provides for the voluntary arbitration of a broad range of patent disputes, including questions of validity and infringement.⁵⁶

Arbitration clauses in IP license agreements are usually preferred by international commercial parties because arbitration clauses typically provide greater predictability with respect to several matters in addition to the place of the forum. Some of the additional comparative advantages include: (i) arbitration provides a neutral forum rather than one of a particular nationality; (ii) because of the New York Convention and the proliferation of pro-arbitration national arbitration laws, arbitral awards typically are enforced more easily and reliably than judicial judgments (particularly when the judicial judgment has been rendered in a nation other than the nation of enforcement); (iii) national courts, unlike arbitration tribunals, often are reluctant to enforce the IP laws of another nation; and (iv) an arbitration

⁵⁴Kenneth R. Adamo, "Overview of International Arbitration in The Intellectual Property Context", 2(7) *The Global Business Law Review*, 2011, at 8, available at: <http://www.globalbusinesslawreview.org/wp-content/uploads/2011/12/gAdamo.pdf> [accessed on July 22, 2013].

⁵⁵Bashar H. Malkawi, *supra* note 10, at 148.

⁵⁶American, Arbitration Association, available at: http://www.adr.org/aaa/faces/aoe/commercial/intellectualpropertylicensing?_afrLoopcommercial/intellectualpropertylicensing?_afrLoop [accessed on August 12, 2013].

clause allows the parties to control the language of the proceedings as well as other important procedural matters.⁵⁷

Licenses are usually given to facilitate the transfer of the right to use, modify or commercially exploit the protected rights. The relationship between the licensor, who is the right holder and the licensee is that of a contractual one. In such matters, there is usually no public policy concern. As the dispute is likely to arise due to one party committing an act that is a breach of the licensing terms, the dispute may be resolved by means of arbitration.

4.3 Law Applicable to Non-Contractual IP Issues

ADR depends on the consent of the parties to the dispute (whether before the dispute arises, as in an arbitration clause included in the contract governing the transaction, or after the dispute arises, as in a written agreement to submit an existing dispute to arbitration), and many IP disputes—particularly infringement claims—are between parties with no pre-existing relationship and who are not inclined to agree to submit their dispute to ADR.⁵⁸

IBM and Fujitsu agreed to arbitration in their 1983 settlement, and this governed their actions once the subsequent disagreements arose (*International Business Mach. Corp. v. Fujitsu Ltd.*⁵⁹). Companies that contract with each other to exchange technology or supplies may insert an arbitration clause and may thus find themselves in arbitration when the deal goes sour. An example is the arbitration between Advanced Micro Devices (AMD) and Intel Corporation. The company's contract to exchange rights to manufacture each other's products included an arbitration clause. When a dispute arose over the transfer of microprocessor technology, AMD exercised its rights under the contract and demanded arbitration. More importantly, most IP litigants are not in a contractual relationship and thus have no business relationship to protect. With no ongoing relationship at stake, parties are less likely to agree to arbitration once the dispute arises.⁶⁰

It is a common understanding that if there are no existing commercial agreements, the party claiming infringement or misappropriation must sue in the tactically most effective national court with jurisdiction over the defendant. Given advances in transportation, communications and technology, most intellectual property is now available throughout the world and, consequently, is

⁵⁷Philip J. McConaughay, ADR of Intellectual Property Disputes, at 3, available at: http://www.softic.or.jp/symposium/open_materials/11th/en/PMcCon.pdf, [accessed on August 12, 2013].

⁵⁸*Id.*, at 6.

⁵⁹No. 13T-117- 0636-85 American Arbitration Ass'n Commercial Arbitration Tribunal 4 (1987).

⁶⁰Anita Stork, "The Use of Arbitration in Copyright Disputes: *IBM v. FUJITSU*", available at: <http://www.law.berkeley.edu/journals/btlj/articles/vol3/stork.pdf> [accessed on August 15, 2013].

simultaneously covered by the intellectual property laws of several nations.⁶¹ International forum-shopping, claim-splitting and defences predicated on forcing the plaintiff to rely on one national forum only have become common.⁶² Parties may, nonetheless, agree to submit a dispute to arbitration in the absence of such a clause through a ‘submission agreement’. In international IP dispute which arise between parties that are not connected by a contract, for example, in an infringement case, it may be more difficult to get the parties to agree to arbitration at this stage, both because the issue may be more contentious after a dispute arises and because the parties may wish to engage in the strategic behavior discussed above. As a result, submission agreements account for far fewer entries into the international commercial arbitration process than arbitration clauses.⁶³

In Indian context, there are two possibilities in relation to arbitration of non-contractual IP disputes, first is contained in Section 89 of Code of Civil Procedure, 1908 which provides that if elements of settlement of dispute exist, the court shall formulate the terms of settlement and refer the parties for one of the modes of ADR including arbitration to be done according to the procedure of Arbitration and Conciliation Act, 1996.⁶⁴ A similar approach can be seen in Section 103 of Patent Act, 1970 of India which provides that in any proceeding of disputes as to use for purposes of government, the High Court may, at any time, order the whole proceedings or any question or issue of fact arising therein to be referred to an official referee, commissioner or an arbitrator on such terms as the High Court may direct. The other possibility exists in the definition of arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996. It provides that an ‘arbitration agreement’ means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, *whether contractual or not*. It further says that the agreement shall be in writing and one of the situations in which the

⁶¹Allen B. Green, “International Intellectual Property Disputes”, McKenna Long and Aldridge LLP, available at: http://www.mckennalong.com/media/site_files/733_International_Intellectual_Property_Dispute_Resolution.pdf [accessed on August 12, 2013].

⁶²*Id.*, at 2.

⁶³*Id.*, at 5.

⁶⁴The Code of Civil Procedure, 1908, Section 89, Settlement of disputes outside the Court.

1. Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for—(a) arbitration; (b) conciliation (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.

2. Where a dispute had been referred:

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act.

requirement of written agreement is said to be fulfilled is during an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied.⁶⁵

Further the Act provides that a judicial authority before which an action is brought in a matter *which is the subject of an arbitration agreement*, shall if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.⁶⁶ In the case of *P. Anand Gajapathi Raju & Ors v. P.V.G. Raju (Dead) & Ors*⁶⁷ Supreme Court held that the phrase ‘which is the subject of an arbitration agreement’ used in Section 8 of the Act does not, in the context, necessarily require that the agreement must be already in existence before the action is brought in the court. The phrase also connotes an arbitration agreement being brought into existence while the action is pending. These provisions of the Act may be of use for arguing in favour of arbitration for non-contractual IP disputes such as infringement cases.

5 Conclusion

ADR and IPR formed the subject matter of the present chapter. The possibility and advantages of arbitration as a mode of ADR for the resolution of IP disputes have been tested keeping in view the nature of IP disputes. As discussed above, ADR has experienced tremendous growth in recent years. The discussion, however, indicates that the acceptance of use of arbitration for IP dispute resolution is facing obstacles. The growth of these two laws has been mutually exclusive and that may be one of the reasons for not mentioning one in the other except in certain very few provisions in laws of India. It seems simple for the disputes covered in contracts in which an arbitration agreement has been incorporated, to be arbitrated. The problem seems to emerge for non-contractual disputes. It may be suggested that looking at the growth of law relating to arbitration certain reference of ADR in IP laws may be of

⁶⁵The Arbitration and Conciliation Act, 1996, *supra* note 24, Section 7:

- (3) An arbitration agreement shall be in writing.
- (4) An arbitration agreement is in writing if it is contained in:
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

⁶⁶*Id.*, Section 8(1).

⁶⁷(2000) 4 SCC 539.

use. For example in Indian Copyright Act, 1957 one may argue for possibility of giving the Copyright board alternative dispute resolution capabilities, many such suggestions are required. It is not out of context to mention as the final conclusion that reluctance to bypass the court system is the biggest hurdle to submission of IP disputes to ADR. Let us advocate for arbitration on the basis of its inherent merits and not on the basis of deficiencies of existing dispute resolution system.

Chapter 24

Intellectual Property Rights and Parallel Trade: Debate on National Versus International Exhaustion of Rights

V.K. Pathak

1 Introduction

Most of the countries have implemented common basic standards of intellectual property (IP) protection based on the widely adopted Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) of the World Trade Organization (WTO). IP protection generally permits right-holders to exclude others from the market. The owner of a patent may exclude others from making or selling an invention. These ‘negative rights’ effectively allow their owners to make the ‘first sale’ of protected goods or services on the market excluding others. But, intellectual property rights (IPRs) are exhausted once the protected goods and services are put on the market.¹ This means that once a protected article has been sold by the IP owner, the further sale of this article can no longer be controlled by him. This is called ‘exhaustion of rights’ and accepted in all countries, within their national jurisdictions.² The right of the IP owner to exclude others is limited by the doctrine of ‘exhaustion of rights’. The exhaustion of rights can be better understood in the context of parallel importation. There is a debate going on the limits of exhaustion. The controversy arises when the legitimate goods are placed on the market by the IPR owner.³ These goods are not counterfeit but since it is not clear that they are infringing goods, they are sometimes called ‘grey goods’ or ‘parallel imports’. Parallel imports involve fundamental issues of international trade and intellectual property policy. It is an important but little-understood issue in

¹Jayashree Watal, *Intellectual Property Rights in the WTO and developing Countries* (Oxford University Press, 2001) at 294.

²Ibid.

³Ibid.

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international trade and the most perplexing problem that arises in connection with the doctrine of exhaustion is its application to parallel imports.⁴

It is in this context the present chapter analyzes the doctrine of exhaustion of intellectual property rights and the issue of parallel importation.

2 Exhaustion of Intellectual Property Rights

Exhaustion of intellectual property rights simply means that rights' holder loses the right to control the resale of the protected goods. The term 'exhaustion' is used because the rights of the owner of the intellectual property are said to be exhausted once the goods have been placed on the market. Once the relevant good is put on sale for the first time by the IP owner, he cannot object to the subsequent circulation of the product as the IPR over these goods are exhausted by the first sale and cannot be exercised twice.⁵ It refers to one of the limits on intellectual property rights. Sometimes this limitation is also called the 'first-sale doctrine',⁶ as the rights of commercial exploitation for a given product end with the products' first sale.

The 'first-sale doctrine' determines the moment when the right owner loses the resale right on the protected goods.⁷ It provides that the IP holder's control over goods or services ends or is exhausted once the particular good or service embodying the IP has been placed on the market or first sold.⁸ Unless and otherwise specified by law, subsequent acts of resale, rental, lending or other forms of commercial use by third parties can no longer be controlled or opposed by authorized person. There is a fairly broad consensus that this applies at least within the context of the domestic market.⁹ There are, however, doubts as to what extent the sale of an IP protected product in different countries can exhaust the IP rights

⁴Margreth Barret, 'The United States' Doctrine of Exhaustion: Parallel Imports of Patented Goods', 27(5) *Northern Kentucky Law Review*, 2000, at 914.

⁵Holyoak and Torremans, *Intellectual Property Law* (Oxford University Press, London, 4th edn., 2005) at 430.

⁶The first-sale doctrine is one of the specific statutory restrictions which have been placed on the exclusive rights of the IP owner. It has been codified in 17 U.S.C. 109 which provide that an individual who knowingly purchase an IP protected work from the IO holders receives the right to sell, display or otherwise dispose of that particular work, notwithstanding the interest of the IP owner. The right to distribute ends, however, once the owner has sold that particular work. Since the first-sale doctrine never protects a defendant who makes unauthorized reproductions of a protected work, the first-sale doctrine cannot be a successful defense in case that alleges infringing reproduction.

⁷Enrico Bonadio, 'Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?', 33(3) *European Intellectual Property Review*, 153–161, 2011, at 153.

⁸Frederick M. Abbott, *Parallel Importation: Economic and Social Welfare Dimensions*, International Institute for Sustainable Development, 2007, at 4.

⁹Ibid.

over this product in the context of domestic law. The issues are crucial in cases of so-called parallel importation.

Historically, national intellectual property law in countries such as the UK and France has given exporters who possess a patent or trademark the right to prohibit such trade. This can be done, for example, simply by marking the goods ‘not for resale in the UK’ or ‘not for resale in France’.¹⁰ More recently, the European Union has overridden this national law by adopting a policy known as ‘Community Exhaustion’, meaning there by that once goods have been placed on the market in the European Union, the holder of the intellectual property right no longer has the right to restrict the further movement of the goods anywhere inside the European Union.¹¹ Under Community Exhaustion, the UK exporter could not prevent the Greek distributor reselling the goods in the UK. However, since Russia is currently outside the EU the owner of the French perfume trademark could prevent re-importation into France.¹²

It has different implications depending on whether the country of importation, for reasons of law or policy, applies the concept of national, regional or international exhaustion.¹³ The national exhaustion does not allow the IP owner to control the commercial exploitation of goods put on the domestic market by the IP owner or with his consent in the originating country. However, the IP owner could still oppose the importation of original goods marketed abroad based on the right of importation. In the case of regional exhaustion, the first sale of the IP protected product by the IP owner exhausts any IP rights over these given products not only domestically, but within the whole region, and parallel imports within the region can no longer be opposed based on the IP right. Where a country applies the concept of international exhaustion, the IP rights are exhausted once the product has been sold by the IP owner or with his consent in any part of the world and can no longer be protected.

The rationale for that doctrine is straightforward. From an economic perspective, right owners receive an amount of money at the first sale of the product, so that it would be inappropriate to receive further amounts, e.g. royalties, at any subsequent change of property of the same good.¹⁴ In absence of exhaustion doctrine IP, right holders would perpetually exercise control over the protected goods and would control economic life.¹⁵ This holds true also from a legal perspective. Indeed patent or trademark registrations give their owner the exclusive right to exploit an

¹⁰Tommaso M. Valletti and Stefan Szymanski, ‘Parallel Trade, International Exhaustion and Intellectual Property Rights: A Welfare Analysis’, 54(4) *The Journal of Industrial Economics*, 499–526, 2006, at 500.

¹¹Ibid.

¹²Ibid.

¹³‘International Exhaustion and Parallel Importation’, available at: http://www.wipo.int/sme/en/ip_business/export/international_exhaustion.htm [accessed on September 29, 2013].

¹⁴Margreth, *Supra* note 4, at 937.

¹⁵*Exhaustion of Rights*, Chap 05 CY564-UNCTAD-V1 November 27, 2004, at 93, available at: www.wcl.american.edu/pijip/download.cfm?downloadfile [accessed on October 26, 2013].

intangible asset but not the physical goods incorporating that asset, which can, therefore, be freely resold. Indeed, ownership of an IPR covering a certain product is different from the ownership of the product itself. The overall purpose of exhaustion regimes is, therefore, to strike and maintain a balance between a public interest, i.e. free movement of innovative goods and the private interest of IPR owners, i.e. remuneration for their creative and artistic efforts.¹⁶

3 Parallel Trade

The exhaustion of rights can be better understood with the help of parallel importation or trade. A parallel import is a non-counterfeit product imported from another country without the permission of the intellectual property owner.¹⁷ Parallel importing is based on the concept of exhaustion of intellectual property rights: according to this concept, when the product is first launched on the market in a particular jurisdiction, parallel importation is authorized to all residents in the state in question. Some countries allow this, others do not.¹⁸ Parallel importing of pharmaceuticals reduces the price of pharmaceuticals by introducing competition. TRIPS agreement in Article 6 states that this practice cannot be challenged under the WTO dispute settlement system and so it is effectively a matter of national discretion.¹⁹ The practice of parallel importing is often advocated in the case of software, music, printed texts and electronic products.

Parallel trade of goods protected by intellectual property rights is an important but little-understood issue in international trade. It is sometimes called ‘grey market’ trade and involves the shipment of bona fide goods across international borders in order to exploit price differences.²⁰ Thus, parallel trade is a form of arbitrage and the term ‘parallel trade’ is used because in many cases the good is shipped back to the country from which it originated. Parallel trade might equally involve the shipment of goods produced under license in one country back to the country of the licensor; the key point is that such trade is motivated by international price differences.²¹ In a free-trade environment, parallel trade prevents monopoly suppliers

¹⁶In case of *Silhouette v. Hartlauer* (Case C-335/96) Silhouette, an Austrian company sold spectacles under its trademark sold an outdated batch to a Bulgarian company for resale in the Former Soviet Union. However, the distributor then tried to put them on the market in Austria, and the court upheld Silhouette’s right to prevent this under its trademark.

¹⁷‘Parallel Imports’, WTO Glossary, available at: http://www.wto.org/english/thewto_e/glossary_e/parallel_imports_e.htm [accessed on October 24, 2013].

¹⁸‘What Are Parallel Imports?’, International Trademark Association, Available at: <http://www.inta.org/Advocacy/Pages/ParallelImportsGrayMarket.aspx> [accessed on October 24, 2013].

¹⁹‘Obligations and Exceptions under TRIPS, What are Member Governments’ Obligations on Pharmaceutical patents?’, *Fact Sheet: Trips And Pharmaceutical Patents*, 2006.

²⁰Valletti and Szymanski, *supra* note 10, at 499.

²¹Ibid.

from engaging in international price discrimination. However, where the good is protected by an intellectual property right this right may permit the owner to prohibit international arbitrage.²²

While industrial producers are pressing for general barriers in order to maintain price differences²³ of goods among various countries, consumers find such differences puzzling in a world that is increasingly heading towards international trade and the removal of trade barriers.²⁴ Parallel trade is often trumpeted as a means to provide the cheap drugs that can avert such crises. The Indian representative to the TRIPs Council has claimed: ‘It is clear that parallel import is one of the most important measures that a member can take to protect public health’.²⁵ The attraction of pharmaceutical parallel trade is that it allows countries to import drugs from wherever in the world those drugs are sold cheaper than in their own country.²⁶

Laws restricting parallel importation permit producers to segment the international market for their goods or services. A producer that places its product on the market in one country can prevent that product from being imported into another country by invoking a parallel IP right. This market segmentation permits producers to charge and enforce different prices for the same product in different markets. Producers need not be concerned that products they place on one national market at low prices will be imported into other national markets where they are charging higher prices.

The doctrine of exhaustion of rights provides the legal basis for parallel importation.²⁷ For all countries, IP rights are exhausted when goods or services are first sold within the national territory.²⁸ They may provide that exhaustion also occurs when a good or service is lawfully placed on the market outside the national territory. In a parallel trade there are two heterogeneous countries in terms of market size, the question as to whether parallel trade freedom is beneficial or detrimental from a consumer’s perspective. It is suggested that parallel trade freedom is detrimental to consumers in the country with the smaller market as less of a certain

²²*Id.*, at 500.

²³These price discrepancies are usually a result of various reasons among which the most important are currency fluctuations, distribution costs, differences in tax levels among different countries, sales promotion strategies and consumer preferences. Ioannis Avgoustis, ‘Parallel Imports and Exhaustion of Trade Mark Rights: Should Steps be Taken towards an International Exhaustion Regime?’, 34(2) *European Intellectual Property Review*, 108–121, 2012, at 109.

²⁴Christopher Heath, *Parallel Imports and International Trade*, at 1, available at: http://www.wipo.int/edocs/mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf [accessed on September 27, 2013].

²⁵WTO, Minutes of TRIPS Council Special Discussionon Intellectual Propertyand Access to Medicines, June 18-22, 2001, WTO Doc No. IP/C/M/31 at 25.

²⁶Nick Gallus, ‘Parallel Policies on Pharmaceutical Parallel Trade’, 11(3) *Int. T.L.R.*, 77–83, 2005, at 77.

²⁷Frederick, *supra* note 8.

²⁸*Ibid.*

product is sold at a higher price. However, parallel trade freedom is likely to be beneficial to consumers in the country with the larger market.²⁹

Parallel importation refers to the import of goods outside the distribution channels contractually negotiated by the manufacturer.³⁰ Because the manufacturer/IP owner has no contractual connection with a parallel importer, the imported goods are sometimes referred to as grey market goods,³¹ which in fact are somewhat misleading, as the goods as such are original, only the distribution channels are not controlled by the manufacturer/IP owner. Based upon the right of importation that an IP right confers upon the IP owner, the latter may try to oppose such importation in order to separate markets. If, however, marketing of the product abroad by the IP owner or with his consent leads to the exhaustion of the domestic IP right, also the right of importation is exhausted and can thus no longer be invoked against such parallel importation.³²

The TRIPS Agreement recognizes discretion accorded to countries to adopt their own policies and rules with respect to exhaustion of rights. This discretion was reaffirmed with respect to patents in the Doha Declaration on the TRIPS Agreement and Public Health, and it was acknowledged in the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.³³ Thus, the ability of an IP right holder to exclude parallel import legally from a particular market depends on the importing nation's treatment of exhaustion of intellectual property rights.³⁴

²⁹Ibid.

³⁰The imports may be described as being imported in parallel to the authorized distribution network. Under most current parallel import provisions the legal meaning of parallel imports require that the plaintiff has to prove that the defendant has imported protected goods into the domestic jurisdiction, without licence. The important point is that parallel imports have, by definition, been made lawfully. Therefore, the actual making of the imported articles did not infringe IP rights. In effect, a parallel import channel exists alongside the authorized by manufacturer. Hazbo Skoko and Branka Krivokapic Skoko, 'Theory and Practice of Parallel Imports: An Essay', Proceedings of the 6th International Conference of the Faculty of Management Koper Congress Centre Bernardin, Slovenia, 24–26 November 2005, at 463.

³¹There is nothing grey about imported goods, as the English Patents Court in the *Roussel Uclaf v. Hockley International*, [1996] R.P.C. 441 observed that grey and mysterious may only be the distribution channels by which these goods find their way to the importing country. In the importing country, such goods may create havoc particularly for entrepreneurs who sell the same goods, obtained via different distribution channels and perhaps more expensively. In order to exclude such unwelcome competition, intellectual property rights have sometimes been of help. There is little doubt that once the owner of an intellectual property right has put such goods either on the market himself or with his consent, there is little he can do about further acts of commercial exploitation on the domestic market.

³²Ibid.

³³Frederick, *supra* note 8, at 5.

³⁴Keith E. Maskus, 'Parallel Imports in Pharmaceuticals: Implications for Competition and Prices in Developing Countries', *Final Report to World Intellectual Property Organization*, 2001 at 2.

Countries are free to determine their preferred exhaustion regime for each form of intellectual property rights.^{35,36}

It is important to note that the issue of parallel imports is at the intersection of competition law, IP law and trade law, and therefore is an important policy issue for governments and international organizations.³⁷ Parallel trading has emerged as one of the major issues of ongoing discussion in the theory of international trade and practice. Parallel imports take a free ride on the marketing and service support provided by the authorized importer or distributor. Intellectual property has hitherto been used with only limited success in attempts to prevent parallel imports.³⁸

The foregoing suggests that the issues involved are diverse, including economic, legal and marketing matters. On the one hand, it is desirable to shield the public from possible confusion or deception regarding the origin of a branded good. On the other hand, it is considered to be good reasons for preventing copyright and trademarks from being used to divide markets and to create artificial barriers to free trade. Therefore, there is no consensus about the current policy relating to parallel imports.³⁹

4 International Legal Frame Work for Parallel Trade

While the Paris Convention is silent on the issue of parallel importation, other international treaties may influence domestic law on this point. Needless to say, that it is expected from a treaty covering all aspects of intellectual property rights that the matter of parallel importation is also included.

It is believed that a ban on parallel trade would violate Art. XI(1) GATT which expressly forbids ‘quantitative restrictions’ of international trade as well as ‘prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures’.⁴⁰ Although it was recognized that parallel importation would indeed fit nicely within the

³⁵Frank Muller-Langer, ‘Does Parallel Trade Freedom Harm Consumers in Small Markets?’, *Croatian Economic Survey*, 2008, at 16.

³⁶Enrico Bonadio, *supra* note 7, at 155.

³⁷Margaret K. Kyle, ‘Strategic Responses to Parallel Trade’, *NBER WORKING PAPER SERIES*, Working Paper 12968, 2007, at 3.

³⁸Paul Rawlinson, ‘Parallel Imports: A Welcome Decision for Asia’, 14(7) *European Intellectual Property Review*, 239–243, 1992, at 239.

³⁹Hazbo Skoko & Branka Krivokapic Skoko, *Theory and Practice of Parallel Imports: An Essay*, Proceedings of the 6th International Conference of the Faculty of Management Koper Congress Centre Bernardin, Slovenia, 24–26 November 2005, at 463.

⁴⁰Jason Potts, ‘The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy’, *International Institute for Sustainable Development*, 2008, at 9.

objective of international free trade advocated by GATT, the agreement could not be reached to allow generally for parallel importation.⁴¹

Article 6⁴² of the TRIPS Agreement is the only provision in the various international agreements on intellectual property rights that deal with the treatment of parallel trade to preserves the territorial privilege for regulating parallel trade. In fact, TRIPS takes no position on exhaustion. During negotiations, no acceptable basis for compromise was offered and the final text of the TRIPS Agreement left that issue unresolved, permitting the debate to continue.⁴³ The effect of the provisions of the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion.⁴⁴

It is evident that TRIPS Agreement dislikes an excessive protection of IPRs if such protection is capable of creating barriers to international trade. The provision of Recital 1 of TRIPS Agreement stresses that WTO Member States wish, ‘to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade’.⁴⁵ The underlying principle is that an overprotection of intellectual property assets could be detrimental to the international flow of goods across countries. This recital and generally the TRIPS Agreement impose to make a comparative assessment of the benefits brought by international exhaustion systems on the one hand and the advantages deriving from a system prohibiting parallel imports on the other hand.

The TRIPS Agreement did not ignore the issue of exhaustion altogether but implicitly left it for each Member State to decide for them whether or not to recognize international exhaustion of IPRs.⁴⁶ The assumption of Article 6 leaves to each Member the ability to make a decision on the principle of both domestic and international exhaustion, each Member state is also left to its own accord to decide whether or not to recognize the exhaustion of the right of importation.^{47,48}

⁴¹Ibid.

⁴²The TRIPS, 1994, Article 6: Exhaustion—For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.

⁴³Alan J. Kasper, ‘A View of the Parallel Imports Issue from an International Perspective’, Available at: http://www.sughrue.com/files/Publication/51080ce5-5e07-415e-98eb1ee3b14/par_imports.htm.

⁴⁴The Doha Declaration, 2001; Para 5(d) reads as: ‘The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to provisions of Articles 3 and 4’.

⁴⁵The TRIPS, 1994, Recital 1.

⁴⁶Alan J. Kasper, *supra* note 43.

⁴⁷Ibid.

⁴⁸Whatever regime is chosen, the immunity from legal actions before WTO courts is guaranteed. Article 6 basically amounts to an ‘agreement to disagree’. Para 5(d) Doha Declaration on the TRIPS Agreement and Public Health states that the effect of the provisions in the TRIPS

Concern with the impact of Article 6 is revealed in the text of TRIPS Article 28, which specifies the minimum rights that are to be conferred on patent holders in Member states.⁴⁹ Included in the traditional rights to prevent unauthorized third parties from acts of making, using, offering for sale or selling a product that is the subject of a patent, is the expressly granted right to prevent unauthorized import a product which is covered by the patent.⁵⁰ It is believed by many that the specific rights to prevent unauthorized import will act as a counter to the concept of exhaustion. But, the view seems to be unfounded.⁵¹ An importation right is certainly useful once it comes to preventing counterfeit products entering the country. Without an importation right, the patentee would have to wait until the counterfeit products are put on the market in order to obtain relief. This is certainly undesirable and inadequate.⁵² However, it is difficult to argue that the right of importation should follow different rules from the rights of production and sale. The importation right concerns an aspect of economic exploitation equal to that of production and sale. If under the classical doctrine of exhaustion, further rights in commercial exploitation are exhausted upon the first sale of a patented article, and if such exhaustion is also assumed when such patented article is marketed abroad, then the exhaustion relates to all aspects of other commercial exploitation including importation.

The correctness of this argument becomes particularly obvious in the case of re-imports.⁵³

Christopher Heath explains the proposition as if a patented article is put on the market by the patentee or with his consent, then further acts of economic exploitation are ‘exhausted’. If the patentee, therefore, would not be able to prevent further acts of sale and distribution, then it is difficult to see how and why the patentee should be able to exert any influence over this article once it has been exported into another country and subsequently re-imported. If a patentee is granted a bundle of rights under his patent, such as production, sale and importation, then upon the act of first sale, the whole bundle becomes ‘exhausted’ once and for all. Consequently, no importation right can be invoked later on for the very article that has been marketed previously, regardless where this took place.⁵⁴

(Footnote 48 continued)

Agreement that are relevant to the exhaustion of intellectual property rights is to leave each member free to establish its own regime of exhaustion, without challenge.

⁴⁹Ibid.

⁵⁰*Supra* note 42, Article 28 states that ‘importing, like all other rights conferred under this Agreement in respect of the use, sale, importation or other distribution of goods, is subject to the provisions of Article 6 above’.

⁵¹Christopher Heath, *supra* note 24, at 2.

⁵²Ibid.

⁵³*Id.*, at 3.

⁵⁴*Id.*, at 10.

4.1 Different Approach on Parallel Trade

Article 6 TRIPs is the result of a compromise between countries supporting a national exhaustion system namely industrialized countries and supporters of international exhaustion and parallel imports. Even certain rich countries such as New Zealand and Australia, which are net importers of IPR-protected goods, supported a system of international exhaustion during the Uruguay Round negotiations. Parallel trade started frightening United States around the mid-1980s when such trade was worth 2–3% of all US imports.⁵⁵ The United States finally approved the neutral wording of Article 6 which still allows them to put pressure on, and induce, other countries to adopt measures forbidding or limiting parallel imports. The said TRIPs plus regime is permitted as TRIPs just sets minimum standards of protection and leaves countries free to determine the appropriate method of implementing such protection. This has prompted certain countries such as the United States to conclude bilateral and regional agreements with other states with a view to obtaining stronger IPR protection. For example, the United States signed bilateral free trade agreements with Morocco (2004) and Australia (2004), such accords limiting parallel trade.⁵⁶

In particular, those accords prevent parallel importation of patented products, at least when the patentee has included a territorial limitation on the distribution of the good by contract or other means. Also, the 2003 US-Singapore Free Trade Agreement contains a provision limiting parallel trade of pharmaceutical products, by giving drug companies a cause of action against parallel traders purchasing drugs from someone whom they know has been contractually prevented from selling to them. These agreements formally comply with Article 1(1) TRIPs, which leaves WTO members free to introduce stronger IPR protection. However, it has been said that negotiating and concluding TRIPs plus agreements containing the above provisions is not consistent with the multilateral spirit of the Doha Declaration, which leaves countries free to choose an exhaustion regime that best suits their own needs without any pressure from other countries.

More generally, the said bilateral approach adopted by countries that accepted to be part of a multilateral context has been considered a violation of international law obligations. On the other hand, most developing and least developed countries consider parallel trade not only as a tool to promote competition on foreign markets and prevent possible anti-competitive behaviours of IPR owners but also as a good opportunity for economic growth. Some of these countries have therefore adopted international exhaustion systems.

⁵⁵David Hummels, ‘Transportation Costs and International Trade Over Time’, at 2, available at: <http://www.krannert.purdue.edu/faculty/hummelsd/research/hummels%20jep%20rewrite%20final%20with%20tables.pdf> [accessed on September 20, 2013].

⁵⁶Carlos Maria Correa, ‘Implications of bilateral free trade agreements on access to medicines’, 84 (5) *Bull World Health Organ*, 2006, pp. 399–404.

Article 6 of the TRIPs leaves the legality of parallel trade to be determined by domestic laws. Despite this apparently clear meaning, some have argued for a different interpretation. The United States, for example, argued that Article 6 does not affect Part II of the TRIPS Agreement. They argued that Part II makes parallel trade illegal. Within Part II, Article 27 requires members to provide patent protection and Article 28(1) requires that protection must give owners the right ‘to prevent third parties not having the owner’s consent from importing’. The US claims that Article 6 prohibits companies owning intellectual property rights from restricting parallel trade that is, the article supports international exhaustion.

The meaning of Article 6 was debated at the WTO in 2001 during a discussion on pharmaceutical prices in developing countries. The United States supported its legal interpretation of the TRIPS Agreement by explaining the detriments of parallel trade. ‘In our view, advocates of parallel importation overlook the fact that permitting such imports discourages patent owners from pricing their products differently in different markets based upon the level of economic development because of the likelihood that, for example, products sold for a low prices in a poor country will be bought up by middle men and sent to wealthiest country markets and sold at higher prices, for the benefit primarily of the middle men’.⁵⁷ The US representative further said: ‘The lack of parallel import protection can also have significant health and safety implications. Our law enforcement and regulatory agencies, especially the Food and Drug Administration, have commented on how very difficult it is for them to keep counterfeit and unapproved drugs out of our country even with the strong parallel import protection provided in the United States’.⁵⁸ Drawing on both these reasons, the US concluded that ‘advocating parallel imports, therefore, could work to the disadvantage of the very people’.⁵⁹

The majority of developing countries⁶⁰ took a different position on both the legality and policy of parallel trade. A paper submitted by developing countries to the TRIPs Council Special Discussion on Intellectual Property and Access to Medicines of June 20, 2001 explained their support for parallel trade: ‘... adoption of the principle of international exhaustion of rights [allowing parallel trade] can be a useful tool for health policies. Where the prices of pharmaceutical products are lower in a foreign market, for instance, a government may allow importation of such products into the national market, so as to allow the offer of drugs at more affordable prices’.⁶¹ Similar views were expressed in individual statements from the

⁵⁷U.S. delegation held at the Council for TRIPs Special session of June 21, 2001.

⁵⁸Ibid.

⁵⁹Ibid.

⁶⁰Submission by the Africa Group, Barbados, Bolivia, Brazil, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela.

⁶¹‘TRIPS: COUNCIL DISCUSSION ON ACCESS TO MEDICINES’, Developing Country Group’s Paper, Paper submitted by a group of developing countries to the TRIPS Council, for the special discussion on intellectual property and access to medicines, June 20, 2001, available at: http://www.wto.org/english/tratop_e/trips_e/paper_develop_w296_e.htm [accessed on September 24, 2013].

representatives from India, Peru and Indonesia, and in a statement from the representative from Tanzania, speaking on behalf of the least developed countries.

The developing countries' paper also argued that parallel imports: '...may be beneficial to prevent anti-competitive practices on behalf of patent owners who offer their patented products at reasonably high prices in the domestic market'.⁶² The meaning of Article 6 was clarified in favour of the interpretation supported by developing countries by Article 5(d) of the WTO Ministerial Declaration on the TRIPs Agreement and Doha Declaration.⁶³

5 Conclusion

The different approaches adopted by different countries create confusion in relation to the regulation of parallel trade. It is established that only international exhaustion is consistent with WTO principles and should, therefore, be imposed on WTO Member countries. The fact that TRIPS gives states the right to choose an international exhaustion regime, allowing parallel imports needs to be appreciated at least from the standpoint of developing nations. There is a need to go further and impose upon all WTO members a generalized and compulsory system of international exhaustion without any scope to rely on national or regional regimes. A multilateral trading system which aims at eliminating obstacles to trade cannot allow countries to adopt national exhaustion systems and build artificial barriers. It appears that national exhaustion regimes contravene the spirit, rules and targets of the GATT/WTO system, and are therefore not secured to be justified. It may be concluded that an affirmative policy favouring parallel imports should be adopted as a matter of international trade policy but the same does not seem to be likely in the near future.

⁶²Amal Nagah Elbeshbishi, 'TRIPS and Public Health What Should African Countries Do?', 49 *African Trade Policy Centre*, 2007, at 24.

⁶³'Implications of the Doha Declaration on the TRIPs Agreement and Public Health', 12 *Health Economics and Drugs Series*, 2002, available at: <http://apps.who.int/medicinedocs/en/d/Js2301e/9.4.html> [accessed on September 24, 2013].

Chapter 25

Transborder Reputation and Trademark Law in India

Adesh Kumar

1 Introduction

Property has always fascinated human beings. The greater property, a man possessed, the mightier he is in the eyes of the society. All the property is either corporeal or incorporeal. Corporeal property is the right of ownership in the material things; incorporeal property is any other property in rem.¹ The concept of intellectual property is derived from a traditional property like movable and immovable. This property is the creation of human wisdom, thus it is incorporeal property over which rights are claimed. It is the property which emanates from human brain or intellect. The term intellectual property is a comprehensive expression. It includes copyright, trademark, patent, designs, geographical indications, etc. Intellectual property law creates property rights in a wide and diverse range of things from novels, computer programmes, paintings, films, television, broadcasts and performances, dress designs, pharmaceuticals, genetically modified animals and plants. The intellectual property also creates rights in various insignia which are applied to goods and services.² The present chapter discusses the law of trademark and the related issues of transborder reputation in India.

¹P.J. Fitzgerald, *Salmond on Jurisprudence* (Universal Law Publishing House, New Delhi, 2004) at 413.

²Lionel Bentley and Brad Sherman, *Intellectual Property Law* (Oxford University Press, 3rd ed., 2009), at 1.

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2 Trademarks

A trademark is a visual symbol applied to an article with a view to indicate the trade source from which it comes. It can be a word, device, label, name, letter, numeral, brand, heading or colours. The purpose of the trademark is to distinguish goods or services of one origin from those of the others. It advertises the product and creates an image for it. As the trademark creates a separate identity of a product, it should be protected from infringement and passing off. Trademarks have gained immense significance over the years due to an increase in competition and an influx of multinational brands. Local brands have also gained strength not only in India but also internationally, due to global business expansion. Trademark law is constantly evolving in an attempt to meet the challenges of the rapidly developing Indian economy. In this age of e-commerce, where physical boundaries between countries have become virtually redundant, brand recognition is considered the foundation for any successful business and probably its most valuable asset. Brands no longer serve just the basic function of guaranteeing the origin of a product or service but now also hold the aura of attraction because of the reputation they command. Needless to say, protection of a brand from being misappropriated, therefore, becomes highly imperative in this era of cutthroat competition.

3 Distinction Between Goodwill and Reputation

The concept of goodwill and reputation are overlapping to each other. But, there exists a line of difference between them. Goodwill is a valuable asset of an establishment or brand which is very closely associated with the property. On other hand, the reputation is based on the various factors which influence the customers to engage with that particular establishment or brand. The reputation of a brand lies in the name of the business, applied mark (figure or design) and trade dress, etc. It is impossible to have goodwill without reputation but there may exist reputation without goodwill. The question of reputation was raised in case of *Leahy v. Glover*³ wherein it was held that in order to succeed the ground of passing off the first essential for the plaintiff is to prove the existence of a business in which there is a goodwill and parts of it reside in exclusive association of the name, mark or other indicia relied on with the business. The same proposition was applied after 70 year in *Star Industrial Co. Ltd. v. Yap Kwee Kor*⁴ wherein reputation was defined as essential species of a personal property and transferable with the business. Reputation is essential to claim for passing off action. The important thing is that misrepresentation is based on the reputation of plaintiff's mark in the mind of the public. The second is that plaintiff's reputation can suffer if the goods passed off by

³(1893)10 RPC 141.

⁴(1976) FSR 256.

the defendant are inferior. The third is the existence of goodwill. The concept of reputation is new to the Indian trademark law. In case of *General Motors Corporation v. Yplon*,⁵ Where the court gave its own explanation on the reputation that reputation involved some kind of knowledge, where it was known by a significant part of the public concerned by the product or services covered by the trademark.

This distinction was clarified by the court in *Anheuser-Busch Inc v. Budejovicky*⁶ where the court expounded that, goodwill, which cannot exist in vacuum, may be confused with mere reputation which may no doubt and frequently does exist without any supporting local business, but which does not by itself constitute a property which the law protects.⁷

4 Protection of Transborder Reputation Under International Conventions

4.1 Madrid Protocol Relating to the International Registration of Marks

The Madrid system for the international registration of marks was established in 1891. The Madrid system offers a trademark owner the possibility to have his trademark protected in several countries by simply filing one application directly with his own national or regional trademark office. An international mark so registered is equivalent to an application or a registration of the same mark effected directly in each of the countries designated by the applicant. If the trademark office of a designated country does not refuse protection within a specified period, the protection of the mark is the same as if it had been registered by that Office. The Madrid system also simplifies greatly the subsequent management of the mark, since it is possible to record subsequent changes or to renew the registration through a single procedural step. However, India is not a signatory to the Madrid Convention.⁸

4.2 Paris Convention for the Protection of Industrial Property

The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to

⁵SA (1999) ECR I-5421.

⁶(1984) FSR 413.

⁷Soumya Banerjee, ‘Transborder Reputation’, 11(4) *JIPR*, 2006, at 275.

⁸Available at: http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf [accessed on October 26, 2013].

prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.⁹

4.3 TRIPs Agreement

The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available based on use. In determining whether a trademark is well known, members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark. Article 6bis of the Paris Convention shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

5 Transborder Reputation of Trademarks in UK

The concept of transborder reputation has been evolved in some of the developed and highly industrialist countries and has its origins in common law. The traditional theory relating to the acquisition of reputation was that the trademark must be used on goods in the concerned country and that the trade mark must be registered in that particular country. Precisely, a mark which was neither registered nor used in a country could not be protected in that country. In *Alain Bernardin v. Pavilion Properties*,¹⁰ popularly known as the *Crazy Horse* case, the English courts refused

⁹The Paris Convention for the Protection of Industrial Property 1967, Article 6bis.

¹⁰(1967) RPC 581.

to grant relief to the French company on the grounds that the said company did not have a place of business in England. Oliver stated that in order to succeed in a passing off action in England it would not be enough only to prove reputation for the trade mark in England but also the existence of goodwill, which in turn could be proved by showing the sales of goods in open markets in England. A passing off action is possible in England even if both parties deal exclusively in exports. Advertising and publicity for the prospective business in the country through circulation of magazines are insufficient to establish a reputation in that country. The general rule was that the reputation exclusively belongs only to the foreign manufacturer or producer and that the importer was not eligible for such reputation even if he is a sole selling agent.

6 Transborder Reputation of Trade Marks in India

Indian Courts have departed from the English Courts while deciding the issue of transborder reputation. Non-availability of the products or the place of business is not the criteria for deliberating the issue of overseas reputation. Goodwill or reputation is the sole decisive factor required to judge the dispute. Even, in the absence of place of business or active sales carried out in India, the claim of transborder reputation of a mark can be substantiated on the fulfillment of the following conditions:

- i. The goods or services have acquired an international reputation.
- ii. Travellers from India to foreign countries have purchased the goods and brought them to India which is a form of importation.
- iii. The goods or services have been advertised in international magazines which have circulation in India and many potential customers of the goods or the services have subscribed to such magazines or seen the advertisements.
- iv. The defendant could not furnish a satisfactory explanation for the adoption of the mark in question.

In India, the concept is embodied in Trade Mark Act, 1999¹¹ wherein the Indian courts have recognized action by foreign plaintiff based on passing off solely upon the reputation of his goods/services on the foreign soil. Transborder reputation has also evolved from the concept of ‘well-known mark’ a concept which acquired statutory recognition in India after amendments to the Trademarks Act in the year 1999. The said amendments were carried out to comply with the requirements of TRIPs, which seeks better protection and treatment for trademarks.¹² A trade mark cannot be registered in India if it is deceptively similar to a well-known trademark and the use of that would take unfair advantage of or be detrimental to the

¹¹The Trademark Act, 1999, section 35.

¹²The TRIPs Agreement, 1994, Article 16.

distinctive character or repute of the earlier trademark. Further, the most essential features in relation to well-known trademarks are (i) knowledge or recognition of the trademark in the relevant parts of public, (ii) promotion of trademark, (iii) duration, extent and geographical area including registration and use. The said criteria are followed even in the case of the trademarks of foreign companies, which mean the aspect of well-known mark is not just limited to the area of Indian trademarks, but spreads out as well. To claim protection under the concept of transborder reputation, awareness of the mark among the Indian consumers has to be established. Once transborder reputation of a trademark is considered then the Courts can extend it not only with respect to goods that are being sold under the mark in India but also with respect to cognate goods.

Transborder reputation is essentially an outcome of the modern policy of liberalization and globalization and in India, the protection of transborder reputation of trademarks was the creative craft of the Judiciary. Indian courts recognized action by foreign plaintiff based on reputation of his goods or services on the foreign soil and have departed from the traditional concept of requirement of use of the mark or registration in India in passing off actions.

One of the earliest instances where transborder reputation has been recognized and protected by Indian Courts is the case of *Ruston and Hornby Ltd. v. Zamindara Engineering Co.*¹³ in which the Supreme Court held that ‘there does not seem to be any requirement that the plaintiff must carry on business in India before bringing an action for passing off for he can prove that he has otherwise acquired reputation in the country’. The Delhi High Court reiterated the above view in *Blue Cross and Blue Shield Association v. Blue Cross Health Clinic*.¹⁴ Another application of principle of transborder reputation is found in the decision of the Bombay High Court in *Kamal Trading Company v. Gillette UK Limited*¹⁵ where the court decided in favour of the foreign claimant and held that goodwill or reputation of marks is independent of availability of the associated goods within the local limits and therefore the non-availability of blades under the ‘7 ‘O’CLOCK’ mark in India would not destroy the foreign claim. With the progress in modern mass communication, public knowledge of a product quite often precedes its actual availability within local bounds, therefore meriting special protection in the eyes of law.

The doctrine of ‘transborder reputation’ was considered in detail for the first time in *N.R. Dongrev. Whirlpool Corporation*¹⁶ following which multinationals were able to enforce their trademark rights against infringing entities. The appellants registered the mark ‘Whirlpool’ in respect of washing machines. Whirlpool Corporation filed a suit for passing off to restrain the appellants from manufacturing, selling and advertising or in any way using the trade mark ‘Whirlpool’ on their product. It was held that the passing off action was maintainable in law even

¹³1970 (2) SCR 222.

¹⁴(1990) IPLR 92 (Del).

¹⁵(1988) 1 PLR 135.

¹⁶1996 (16) PTC 583 (SC).

against the registered owner of the trade mark. It was held that the name of ‘Whirlpool’ was associated for long with Whirlpool Corporation and that its transborder reputation extended to India, the mark ‘Whirlpool’ gave an indication of the origin of the goods as emanating from or relating to Whirlpool Corporation. It was held that an injunction was a relief in equity based on equitable principles which required that an injunction be granted in favour of Whirlpool Corporation. It was also held by the Supreme Court that ‘in today’s world it cannot be said a product and the trade mark under which it is sold abroad, does not have a reputation or goodwill in countries where it is not available. The knowledge and awareness of it and its critical evaluation and appraisal travels beyond the confines of the geographical area in which it is sold’. The Court further observed that ‘these cases recognized that the reputation of a trader, trading or carrying on the business in another country, can travel to a country where he had carried no business. The traders’ transborder reputation can be established on the basis of extensive advertisements and publicity. Such a trader could obtain injunction in a court where he was not trading to protect his reputation’.

The Indian Courts have recognized transborder reputation by holding that a product and its trade name transcends the physical boundaries of a geographical region and acquires transborder overseas or extra territorial reputation not only through import of goods but also by its advertisement. The knowledge and awareness of the goods of foreign trader and its trade mark can be available at a place where goods are being marketed and consequentially being used. A foreign entity can now enforce trademark rights against an Indian entity if it can demonstrate that its trademark enjoys transborder reputation by way of documentary evidence (e.g. magazine and newspaper articles, television coverage, online presence). In *Apple Computer Inc. v. Apple Leasing and Industries*¹⁷ the High Court of Delhi held that, ‘if the reputation of a trader, trading or carrying on business in another country, had travelled to a country where he carried on no business, this reputation having been acquired on the basis of extensive advertisements and publicity, then another trader could be injuncted to protect the reputation of the trader who was not trading in the country’. The principles laid down in *Crazy Horse Saloon* case was not accepted by the Indian judiciary. In the case of *Indian Shaving Products Ltd*

- v. *Gift Pack*¹⁸ the Delhi High Court held that where the defendants sought to enter into a joint venture project with the plaintiff’s business, it is implicit that the defendants were aware of the status and reputation of the plaintiff’s mark.

The Supreme Court finally established the law related to the transborder reputation in the case of *Milmet Oftho Industries and Ors. v. Allergen Inc.*¹⁹ by giving the view, ‘the mere fact that the respondents have not been using the mark in India

¹⁷(1993) IPLR 63 (Del).

¹⁸1998 PTC 698 (Del).

¹⁹(2004) 12 SCC 624.

would be irrelevant if they were first in the world market'. The Supreme Court of India relied on the doctrine of transborder reputation, thereby protecting a mark that was adopted and used in the international market prior to the adoption and use of an identical mark in India, even though the foreign mark was never used in India. In the instant case Indian pharmaceutical company manufacturing 'Ocuflax' while the respondent, apparently a foreign company, was also manufacturing 'Ocuflax', both being medicinal preparations relating to the eyes. According to the respondent, it first used the mark in September 1992 after which it had marketed the product in several countries across the world but had still not entered the Indian market. The appellant was granted registration by the Food and Drug Control Administration in August 1993 and had also applied for registration of the mark 'Ocuflax' in September 1993 that is almost a year after the respondent. The respondent filed a suit for injunction for passing off against the appellant. The court held that the mere fact that the respondents have not been using the mark in India would be irrelevant if they were first in the world market. The decision was upheld by the Supreme Court in *Austin Nichols and Co. v. Arvind Behlor* the *Blenders Pride* case²⁰ which is a step in the same direction. This decision settled the controversial issue relating to the importance and weightage to be given to the doctrine of transborder reputation and the court held that:

the Plaintiffs having come out with 'Blenders Pride' whisky first in the international market were first past the post; even though the defendants were the first to do so in India. The fact that the product of the plaintiffs was not manufactured or sold in India from 1973 (when it first entered the market) till 1995 when it became freely available in India, is of no consequence.

In re *Aktiebolaget Volvo v. Volvo Steels Limited*²¹ the Division Bench of Bombay High Court reiterated the principles established with regard to the doctrine of cross-border reputation where the court considered subsequent events like the intention of the party to go into the Indian market as touching the balance of convenience which is a factor that governs the prudence of the courts in granting injunctions in the case involving the subject matter. Nonetheless, with respect to the cross-border reputation, the Division Bench relied on the *Whirlpool* case²² and held that cross-border reputation is recognized in India and to constitute the same actual sale is not necessary for the plaintiff to ascertain its reputation and goodwill in India.

The doctrine of transborder reputation is not absolute and limitless. The courts have enunciated a comprehensive set of guidelines circumscribing its boundaries. The Calcutta High Court gave a different explanation in *Kabushiki Kaisha Toshiba v. Toshiba Appliances Co.*²³ that use of the mark in concerned country is more significant than the transborder reputation. It observed that if there are no goods at all

²⁰2006 (32) PTC (Del).

²¹1998 (18) PTC.

²²Supra note18.

²³1994 (53) PTC (Cal.).

in physical existence, there could be no use of the mark in relation to those. It is the same, if the goods are in the physical existence somewhere else than in Indian market. For, however big the foreign market of a trader might be, and however famous his trade mark might be all over the world, yet to qualify for use of the mark in relation to the goods within Trade and Merchandise Marks Act of 1958, such use must be made in India and not abroad. Further, it held that a mere use of the mark in advertising on other publication media is insufficient as ‘use’ because if it were not so, trafficking in trademarks could be legally indulged in, for a mark could be registered and then kept alive merely by advertisement without ever putting any goods into the market. But the Division Bench of the same court in *M/s J.N. Nicholas (Vimto) Limited v. Rose and Thistle*²⁴ opined that the use of a trade mark does not necessarily imply the actual sale of the goods bearing such mark. Use can be in any form. Mere advertisement, without having even the physical existence of the goods in the market, can be said to be a use of the mark. The supreme court of India finally settled this issue in *Milmet Oftio Industries and Ors. v. Allergen Inc.*²⁵ and cautioned against the practice of throttling of marks such that transborder reputation could not be cited by those who had no intention of entering the local market in the near future. A natural corollary is that transborder reputation is not an independent ground for protection of trademark unless accompanied hand in hand with evidence of the use of trademark in the territory where such relief is being sought. The Intellectual Property Appellate Board laid down wide principles to regulate transborder reputation. It was laid down that mere filing of the details of sales figure of goods in foreign countries does not prove that the mark has a reputation in India. In order to succeed in a reputation proceeding, sufficient evidence of promotion of the said mark by means of advertising, publicity and presentation at fairs and exhibition, newspapers, sports sponsorship, journals and magazines have to be adduced. The international reputation of a trade mark could enable the owner to obtain an injunction in the courts of a country in which he is not even trading. Indian courts have also granted an injunction in cases of transborder reputation. In *Jolen Inc. v. Shobanlal Jain*²⁶ transborder reputation was established by the fact that the plaintiff marketed goods in other countries. Considering the fact that there was a copy of the plaintiff’s trade mark, an interim injunction was granted.

7 Conclusion

The growth and development of international market make it important that transborder reputation of a trade mark is properly recognized and protected in different countries. Indian courts have given due importance and protection to

²⁴1994 (83) PTC.

²⁵Supra note 21.

²⁶2005 (30) PTC 385 (Mad).

transborder reputation of a trade mark. It is always suggested that the foreign traders should get their marks registered in as many countries as possible in order to avoid any kind of conflict. The courts in India have recognized and protected transborder or spill over reputation of international trademarks of overseas companies in various cases and continue to do so. Even though the courts have laid down various guidelines to protect the interests of the traders and combat the incessant menace of passing off prevalent in the market today, with the situation in the Indian market and the deep-rooted plagiarism cultivated in the society there seems to have been a dilution in the implementation of these parameters. Thus, the need to streamline the legislative provisions so as to reduce the confusions as regards protection of transborder reputation of trademarks is apparent.

Part IV

Information Technology Law

Chapter 26

Information Asset as Property: A Legal Perspective

Sonny Zulhuda and Abdul Haseeb Ansari

1 Introduction

‘Information asset’ has not been perceived only as a jargon of the information age we are living today. Rather, it has increasingly become the reality, where people and society attach more values on business information and information system. The contemporary ‘information age’ is, therefore, not merely about a change of gadgets, but more so about a change of a whole environment.¹ It is an arena where information becomes the main asset of business and the most valuable property of its owner. It is the sphere where politicians and policymakers battle to control sources of information²; and the battlefield where technologists compete to create paramount powerful tools and devices in order to keep, store, process and exploit various information.³ This is where professionals are known as information

Authors are thankful to Prof. Ida Medieha Bt. Abdul Ghani Azmi, Ahmad Ibrahim Faculty of Laws, International Islamic University Malaysia, Malaysia.

¹J. Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Harvard University Press, Cambridge, 1997) at ix.

²See, for example, N. Chomsky, *Media Control: The Spectacular Achievements of Propaganda* (Open Media, 2nd edn, 1991).

³W.H. Davidow, *Overconnected: The Promise and the Threat of the Internet* (Delphinium Books, New York, 2011).

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workers; and furthermore at macro level, it is where the society is demographically divided into the information-rich and information-poor.⁴

For legal fraternities, it is crucial to acknowledge this change, and not to leave it merely in the hands of computer scientists. This is because the information age is a discourse of a cross-disciplinary realm. It is for this reason that it is a matter of concern to all, including scientists, technocrats, lawyers, accountants, social scientists, political scientists and business people. But it is a matter of prime concern of policymakers. In certain situations, they can even find themselves incapacitated if they choose to work out of the realm. In the words of Boyle, this is called 'the collapse of disciplinary boundaries'.⁵ People from different disciplines are about to link up to common subjects of information technology. It is now usual, for example, to see scientists, environmentalists and policymakers to talk about mitigating greenhouse effects; or scientists engaged with genetic research, biologists and lawyers talk about biotechnological patent issues; or accountants, lawyers and technologists talk about online corporate fraud; and many more instances. With this context in mind, this chapter demonstrates certain challenges posed by the information age to the body of law and in particular on the law of property, that is, whether an information asset today will legally qualify to be considered as a property in the true sense of term.

The way people today store, reformulate and process information, and eventually generate revenue from it, has marked the shift from a raw material-based and labour-exploiting business to the information and knowledge-based entrepreneurship. Information is increasingly becoming a commodity instead of just a business process tool. In view of this, the chapter revisits the notion of information as an asset and analyzes as to how law responds to this development. The first part of it seeks to reconfirm that information is something having value in today's business that is characterized by globalization, digitization and deregulation of rules. The second part describes and analyzes as to how the law notably in the judges' solicitudes contributes to the strengthening of this notion by tendency to recognize the proprietary status of information, something that is not yet well established. The chapter argues that the law is in a changing mode towards a more information age-friendly one.

2 Information as Intangible Asset

Thomas Stewart observed that the new information age was shifting the fundamental source of wealth from natural resources and physical labour to information and knowledge.⁶ He believes that success comes to companies that have the best

⁴Mahathir Mohamad, *Regional Cooperation and the Digital Economy*, (Pelanduk Publications, Kuala Lumpur, 2000) at 142.

⁵Boyle, *supra* note 1, at 4.

⁶T.A. Stewart, *Intellectual Capital* (Doubleday/Currency, New York, 1997) at 12.

information and wield it most effectively. In other words, information is a very powerful asset. This chapter supports this view. It is believed that information is an invaluable asset for individuals and organizations alike. In general, good information reduces costs and saves time by avoiding duplication efforts and preventing unproductive activities. Good information also helps and improves decision-making, which proves very crucial for the corporate life. When it comes to business perspectives, information is needed to establish strong and fruitful relationship between businesses and customers.

As some scholars have noted that information technologies, which are primarily intangible assets, generate wealth and ameliorate growth in modern economies.⁷ Assets are everything owned economically by a company that has monetary value.⁸ Thus, an intangible asset is everything that is not physical, e.g. investment, but it is of value to the company.⁹ They may have ‘claims to future benefits that do not have a physical or immediate financial form’.¹⁰

Intangible asset is, therefore, a company’s intangible resources; and in contrast to tangible assets and financial capital, this class of assets is becoming an ever more important tool for the creation of economic values, which is intensified by increasingly competitive edge resulting in monetary advantage for companies.¹¹ And this is all just a logical consequence of the tremendous change of the information economy. The driving factors to the emergence of these intangible assets have been rightly summed up by Professor Baruch Lev of the New York University and his colleague as an intensified competition brought about by the globalization of trade, far-reaching deregulation, and ever faster technological changes.¹²

Thus, business organizations are radically changing their business models, and many of these changes involve or create such intangibles. What happens next, one can guess, is that the firms often decide to substitute intangibles for physical assets and accelerate the pace of innovation by exploiting more on these intangible assets. The increasing commercial value that develops over personal data may provide the best example. Businesses, for instance, do value highly information about their customers and the consumption patterns of those customers.

⁷See, for example, Y. Benkler, *The Wealth of Networks* (Yale University Press, New Haven, 2006); J.R.M Hand and B. Lev, *Intangible Assets: Values, Measures and Risks* (Oxford University Press, Oxford, 2003) at 1.

⁸J.H. Daum, *Intangible Assets and Value Creation*, (Wiley, West Sussex, 2003) at 16.

⁹Ibid.

¹⁰Hand and Lev, *supra* note 7, at 1, they observed that patents, bioengineered drugs, brands, strategic alliances, customer data lists, a proprietary cost-reducing Internet-based supply chain are all examples of intangible assets.

¹¹See, for instance, the International Accounting Standards (IAS) on Intangible Assets. The document illustrated that intangible assets include: computer software, patents, copyrights, motion picture films, customer lists, mortgage servicing rights, licenses, franchises, customer and supplier relationship and marketing rights.

¹²Hand and Lev, *supra* note 7, at 1.

At organizational and corporate levels, intangible assets are no more than just accountants' businesses; they naturally become among top-level management's issues. Intangible assets now constitute an important topic of the corporate boardroom.¹³ The reasons for this are because the intangible assets can generate additional revenue streams and the fact that poorly managed intangible assets proves expensive and involves risk for the company.¹⁴ Ironically, it turns out that due to the fact that such information assets are so economically and commercially valuable, that they in some cases become subject to malicious attempts of fraud and abuses.

This emergence of the intangible assets is also felt at macroeconomic level. In 2002, the then US Federal Reserve Chairman Alan Greenspan testified that intangibles were also playing a major macroeconomic role in 'changing the growth and cyclical dynamics of national economies'.¹⁵ Thus, unsurprisingly that in today's US, as reported in *the Economist*, intangible assets account for more than half of the market capitalization of America's public companies; similar to it, another analyst has calculated that the intangibles have shot up from 20% of the value of companies in the S&P 500 in 1980 to around 70% in 2010.¹⁶

In Malaysia, there has been a strong indication that the government is redirecting its focus to new emerging technologies to form a strong knowledge-base economy and human capital. Having realized the value of such intangible assets, including information assets and human capital, the present administration of the Government of Malaysia has geared the concern over the developing of human capital having expertise in the area of information and computer technologies. It made clear that the country's economy will become more relied on human capital, particularly with increasing competition from globalization and progressive market liberalization.¹⁷ With the Ninth Malaysia Plan, the development of such kind of human capital is made one of key thrusts of the development plan; this is continued in the on-going 10th Malaysia Plan. All these policy delineations are strong evidence that the intangibles are already a big thing in the country and must not be overlooked.

¹³M.W. Haller and L. Spicer, "Beyond IP: The Intellectual and Intangible Boardroom", in J. Wild (edi.), *Building and Enforcing Intellectual Property Value: An International Guide for the Boardroom*, (Globe White Page, London, 2003) pp. 33–37.

¹⁴*Id.*, at 35, It was noted that the American Society for Industrial Security and Price Waterhouse Coopers (PWC) indicated that the cost of the theft of trade secrets to Fortune 1000 American business was over US \$ 45 billion in 1999.

¹⁵Available at: <http://www.federalreserve.gov/boarddocs/hh/2002/march/testimony.htm>.

¹⁶A. Wooldridge, "The Battle for Brainpower", *Economist*, October 7, 2006.

¹⁷See the Ninth Malaysia Plan, available at: <http://www.epu.jpm.gov.my/rm9/html/english.htm>, at 24.

3 The Characteristics of Information Asset

The recognition of value in information calls for the need to understand unique characteristics of information assets.¹⁸ Without such understanding, the information owners may risk losing the advantages of the asset due to inability to control the access to such information. To describe how different its characteristics are from the traditional assets, Daum, for instance, showed that the traditional economics theory of ‘the law of diminishing returns’ did not apply to information asset. Instead, the opposite applies, i.e. ‘the law of increasing returns’.¹⁹ Thomas Stewart is more particular as to the unique characteristics of knowledge and information assets compared to the traditional ones. His observation is summarized as follows²⁰:

- Information is a public good²¹; it exists independent of space, and it does not prevent two or more people from obtaining the same information. It is noted that this chance of easy duplication can pose a serious threat to the integrity of information assets.
- Abundance factor, which means, that information increases in value because it is abundant, not because it is scarce.
- Unique cost structure, e.g. producing the first copy is disproportionately high compared to the cost of further copy, as books, software or movie.²² On this point, Rubin and Lenard observed that ‘an important economic property of information was that, once produced, that could be used multiple times at a low marginal cost without any decrease in its value.²³

¹⁸See also G. Olivar-Pascual, “Intangibles: An interdisciplinary approach”, in J. Wild (edi.), *Building and Enforcing Intellectual Property Value: An International Guide for the Boardroom* (Globe White Page, London, 2003) pp. 386–389 at 386.

¹⁹Daum, *supra* note 8, pp. 35–36; the traditional theory basically says that the value of things will be diminished when more people use them. Informational value, in opposite, may increase with the increase of its uses.

²⁰Stewart, *supra* note 6, pp. 170–173.

²¹Some writings were helpful in understanding further about the nature of information as public good. Read, for example, J. Sloman and M. Sutcliffe, *Economics for Business*, (Essex, UK, Prentice Hall, 2nd ed., 2001), ‘when goods, like information, have the two features of ‘non-rivalry’ and ‘non-excludability’, the free market will simply not provide them.’; R. Cooter and T. Ulen, *Law and Economics*, (Boston, Pearson Education, Inc., 4th ed., 2004), ‘to correct this ‘market imperfection’, government’s intervention is needed to provide such public good or to subsidize private entities to provide that goods.’; and N. Elkin-Koren and E.M. Salzberger, *Law, Economics and Cyberspace: The Effect of Cyberspace on the Economic Analysis of Law*, (Cheltenham, UK, Edward Elgar, 2004), ‘this central intervention can be in form of legislation of regulatory framework that will eventually provide incentive to whoever provides such informational good, this is especially apparent in the laws on intellectual property’.

²²This is among the reasons why copyright piracy is very popular, rampant and yet difficult to tackle.

²³P.H. Rubin and T.M. Lenard, *Privacy and the Commercial Use of Personal Information*, (Kluwer Academic Publisher, Boston) at 11.

- There appears to be no meaningful correlation between knowledge input and knowledge output, i.e. the value of information asset is not necessarily related to the cost of acquiring it. For instance, the benefits of training are unrelated to its expenditure, or the competitive advantage gained by an invention may be unrelated to its creation spending.

With the noted uniqueness, discussed above, it is highly desirable that the corporate entities re-examine the resources at their disposal. They should be able to recognize and identify the value of their intangible assets. Only when they are clear with the amount of those values, it is possible to quantify the needs for information security, and therefore it enables them to take relevant steps to protect their assets. As one information security expert rightly put it as ‘it is the use of information which primarily distinguishes one organization from another, which will determine its success or failure, and which must be protected so that the organization will survive.’²⁴

4 Is Information a Property?

One mounting problem, which is necessary to be resolved, is deciding whether information is property? Can information be ‘legally’ owned and traded? These questions quickly arise primarily because information is intangible and it is difficult to control its spread.²⁵ Clarity on this issue is necessary because it may critically determine what the information owners/users can or cannot do. From the opposite side, it may clear the border of liabilities such as that of illegal acquisition, intrusion, infringement and abuses.

The proprietary status under the property right regime may also serve as an incentive for the information owner and information developer. It is argued that the proprietary right might help to regulate the consumption and use of the information, and to guarantee the efficient use of the works by allowing their commercialization.²⁶

This issue requires examination of the basic concept of property and ownership and its relation with ‘information’. Property is something, which can be owned, or an aggregate of rights having monetary value, which includes ‘money and all other property, real or personal, including things in action and other intangible property.’²⁷ Property is also known as a bundle of right, which stipulates what people, may and may not do with the resources they own.²⁸ Roger J. Smith of Magdalen

²⁴D.L. Pipkin, *Information Security: Protecting the Global Enterprise*, (Prentice Hall, New Jersey, 2000) at 13.

²⁵R.A. Heverly, “The Information Semicommons”, 18 *Berkeley Technology Law Journal*, 1127, 2003, at 1151.

²⁶N. Elkin-Koren and E.M. Salzberger *supra* note 21, at 52.

²⁷L.B. Curzon, *Dictionary of Law*, (ILBS, Kuala Lumpur, 4th ed., 1995).

²⁸R. Cooter and T. Ulen, *Supra* note 21, at 77.

College, Oxford wrote that ‘there are two principal elements in a property.’²⁹ The first concerns the attribute of property that it can be owned, bought and sold. And the second element concerns the right to exclude others.

It follows that if one can establish that an information asset is legally speaking his property, thus he can rightfully trade such assets and he will also have the right to exclude or stop others from using or misusing his information asset. It also follows that whoever uses or attempts to use the information that belongs to someone else can be held legally liable for either civil or criminal actions.³⁰

When it comes to information, such proposition poses certain problem. Due to its intangibility, can information be owned? This does not seem able to comply with the earlier attributes of a property. Nevertheless, there is an established embodiment of proprietary status for certain types of information, that is, those, which are attributed as intellectual property (IP).³¹ An intellectual property (IP) is a property in legal sense: it is something that can be owned and dealt with. IP rights give rise to a form of property that can be dealt with just as with any other property, and which can be assigned, mortgaged and licensed.³²

4.1 ‘Information Is Not a Property’—The Opposing View

There are certain qualifications where information turns to become an intellectual property, thus eligible for legal protection under IP-related legal regime. If eligible, the information becomes a property, i.e. intellectual property.

Having said that, question remains as to the remaining types of information, which are not necessarily eligible for the protection of IP. Can these non-IP information assets be given a proprietary status? Or in other words, can they be protected under a property law? This is the focal area where the proprietary status of information seems unsettled, if not sharply debated. Latham C.J. voiced such concern in a 1943 case:

²⁹Roger J. Smith, *Property Law*, (Harlow, Pearson Education Ltd., England, 3rd ed., 2000) pp. 3–4.

³⁰Jacqueline Lipton from Monash University elaborated that the conception of property justifies various areas of legal rights and liabilities including those of trading contract, taxation, electronic environment disputes, crime against property, as well as in secured finance law. See, J. Lipton, “A revised property concept for the new millennium?”, 7(171) *International Journal of Law and IT*, June 1999.

³¹For basic conceptual discussion on intellectual property rights, see, for example, D.I. Bainbridge, *Intellectual Property*, (Financial Times-Pitman Publishing, London, 4th ed., 1999).

³²*Id.*, at 10; Ida Madieha Azmi “The Philosophy of Intellectual Property Rights over Ideas in Cyberspace: A Comparative Analysis Between the Western Jurisprudence and the Shari’ah”, 19 *Arab Law Quarterly*, 191–207, 2004 at 191.

I am unable to regard the communication of information as constituting a transfer of property. Upon such a communication the transferor still has everything that he had before, and the transferee continues to hold what he has received... Knowledge is valuable, but knowledge is neither real nor personal property.³³

The tendency to refuse a proprietary right in information has been shared by many other judges in various jurisdictions with various reasons and consideration. It was argued that ‘information is not property in normal sense because it is normally open to all who have eyes to read and ears to hear’.³⁴ Due to this, it is not possible to steal information.³⁵ In a Canadian case, the court held, ‘the absence of deprivation to the owner was also one of the reasons to deny the proprietary status of information in question thus provided no ground for conversion and theft’.³⁶ Pamela Samuelson of the University of Pittsburgh noted that ‘this attitude had been traditionally followed by American judges in many criminal and civil laws alike’.³⁷ This idea of non-proprietary nature of information is seen as a logical consequence owing to its intangibility.³⁸

4.2 Commentary and Analysis—And the Proponent Views

From the above judicial reluctance, it can be commented as follows: There is a tendency of courts to overlook the special nature of information asset. To hold a property perspective under a traditional nature of physical property may just lead to reluctance to recognize the value in its intangibility. By right, being intangible does not preclude another importance aspect that may well provide stronger reason for according a proprietary status, i.e. the labour put in creating such information and the utility it has for the owner specifically and to the economy in general. Obviously, the utilitarianism theory applies here. Furthermore, it is noted that because of the fact that a number of information are not eligible for protection under intellectual property right, there is a least favour law can do by assigning a proprietary status, those information assets can effectively be protected under other grounds such as conversion, contract, confidence and even a criminal law.

Is there any hope? One may wonder—and may be relieved that there is. In the absence of statutory initiatives on this aspect of law, judges, across several common law jurisdictions, are using several competing taxonomies to grant recognition to

³³*Federal Commissioner of Taxation v. United Aircraft Corporation* (1943–1944) 68 CLR 525.

³⁴This is the dissenting view of two law Lords in *Boardman v. Phipps* [1966] 3 All ER 721, and [1967] 2 AC 90, the majority view in this case was that the information is nevertheless a property.

³⁵*Oxford v. Moss* [1978] Cr App R 183.

³⁶*R v. Stewart* [1988] 50 DLR (4th) 1.

³⁷Pamela Samuelson, “Is information property? (Legally Speaking)”, *Communications of the ACM*, March 1991, at 15(4).

³⁸John Perry Barlow, “Selling Wine Without Bottle: The Economy of Mind on the Global Net,” available at: http://www.eff.org/pub/intellectual_property/idea_economy/article.

the proprietary status of information amid with various reasons and approaches. The earliest of them can be found in the words of Lord Cottenham LC in an English case of 1949.³⁹ The court in this case liberally employed notions of property in fashioning the basis of an action to protect confidences. It was held that both the work and the information represented in the work belonged to the owner.

Other judges' decisions and judicial notes look into this issue with various approaches and for various purposes. It is observed, for example, in an English case, a servant may not take trade secret away because they constitute his Master's property.⁴⁰ Know-how has also been treated by another English court as a discrete form of corporate property for the purpose of taxation.⁴¹ Meanwhile, the majority of law Lords in the case of *Boardman* cited above was prepared to consider confidential information about share prices obtained by the trustees as property of the trust.

In certain situations, court had also entitled proprietary right to information based on the manner such information is generated or used by its owner while carrying out his affairs. On this basis, certain information becomes property because of the confidentiality being imposed by the owner on receiver of such information, for example, in the context of employment. As touched earlier in *Broadman v. Phipps*,⁴² Lord Hodson in delivering the majority view noted that information of its nature can properly be described as property. He observed,

‘know-how’ in the commercial sense is property, which may be valuable as an asset. Nevertheless, his lordship emphasized that this proprietary nature is associated with the confidentiality acquired by such information.⁴³

4.3 The Position in Malaysia

In Malaysia, there was a breakthrough legal reform introduced by the court in 1998.⁴⁴ They had initially come up with a spectacularly loose approach in determining the proprietary status of information. It is spectacular for two reasons: First, this case came from Malaysian court, which is relatively new to the debate of proprietary nature of information as such. Secondly, the judge's observation was considerably liberal and encouraging. Kamalanathan Ratnam J. examined the proprietary nature of information in order to form basis for a claim for conversion. The important quote is as follows:

³⁹*Prince Albert v. Strange* [1849] 1 Mac and G 25.

⁴⁰*Herbert Morris Ltd. v. Saxelby* [1916] 1 AC 688.

⁴¹*Rolls Royce Ltd. v. Jeffrey* [1962] 1 All ER 801.

⁴²[1966] 3 All ER 721, pp. 745–746.

⁴³On what constitutes confidential information, read Jalil Juriah Abdul, *Confidential Information Law in Malaysia: Cases and Commentaries*, (Sweet & Maxwell Asia, Kuala Lumpur, 2003) at 12.

⁴⁴*ELECTRO Cad Australia Pty Ltd. & Ors v. Mejati RCS Sdn Bhd & Ors* [1998] 3 MLJ 422.

I do not see why a claim for conversion cannot be upheld in respect of information. Although I note that there has been reluctance by the courts to treat information as property, it is my conclusion that due to the rapid and highly volatile revolution in technology and with the concept and subsequent inception of the Multimedia Super Corridor (MSC) that our country has embarked upon to launch a clear vision 2020, the courts must take a broader view of the meaning of property and include information as such... I am therefore willing to hold that information can form the basis of an action of conversion whether or not it is technically a part of intellectual property.

In another important note, the judge explained the rational behind such decision, ‘that a mere dealing with property in a way inconsistent with the rights of owner is sufficient, hence the possession of property or deprivation of use may be irrelevant.⁴⁵

It is encouraging that the court expanded the meaning of property to include information as such: so, not only intellectual property will be protected as ‘property’ but also other types of information. It also helped by redefining infringement of the right to information property so as to include inconsistent use of such information against the owner’s right, regardless the absence of deprivation to the owner of such information.

Even though the *ELECTRO Cad* case⁴⁶ had initially considered issues involving confidential information, yet the above decision has taken the discussion of whether information is property to another level: broader and more flexible. It is submitted that the court’s decision, observation and ratio given in this case are very important for the proliferation and protection of information assets. In Malaysia, this development of property law can be taken further to establish better protection to information assets.

5 Conclusion

The multiplicity of approaches taken by courts in various jurisdictions as examined above is indicative that the meaning of property is far from fixed and certain. It is quite certain that the law of property is open to adjustment in respect to information.⁴⁷ It is argued that not only the law needs to regulate people’s behavior towards the use and exploitation of information, but also it needs to redefine the concept of property itself, and move beyond the concern over intellectual property. In the very age where information completes the equation of life, it is very important to accord proprietary status to information assets. We are indeed witnessing the concept of property law evolve and expand due to societal and technological demands. Apart from that, the writers also argued that the law on confidential information should

⁴⁵Ibid.

⁴⁶Ibid.

⁴⁷J. Lipton, “A Revised Property Concept for the New Millennium?” 7(171) *International Journal of Law and IT*, June 1999. Lipton noted that ‘the concept of property has never been absolute.’

also be readily modified to accommodate the myriad of amorphous mass of information asset, which deserves some protection for the owners.

Having said one finds that the situation is not completely satisfactory. Even though later judgments examined earlier indicated the overall change of courts' attitude towards recognizing information as property, this development warrants some parliamentary initiatives too. To some extent, case law is nevertheless insufficient to ensure a stable long-term protection. Case law is by nature sporadic, centered at solving case by its own contexts and circumstances. It is therefore reactive rather than proactive, thus this aspect of law without statutory basis may be lagging behind the fast pace of information technology revolution.

In the Malaysian context, the statutes have long been silent as to the applicability of property concept to the information. The most that we have is laws that regulate people's behavior to the information, but not on the nature of the information itself.⁴⁸ Therefore, it is rather unfortunate to leave the development of this legal aspect in the hands of court. For this reason, one needs to re-look at our legal landscape—both existing and upcoming ones—to see where statutes can help and promote more protection to the information assets; hence more works and researches in this area are warranted. At the end, this chapter strongly recommends further initiatives to be taken by law stakeholders to provide practical legal framework to ensure the information asset flourish in this knowledge-based economy.

⁴⁸See, for example, the Computer Crimes Act, 1997 on the criminality of certain abuse of information system; the Electronic Commerce Act, 2006 on the enforceability of electronic message as a form of binding transaction; and the Personal Data Protection Act, 2010 on the rights over privacy and security of personal data, both in electronic form and those on paper document.

Chapter 27

Data Protection Law and Policy Factor Impact on Public Trust in E-Government System in Developing Countries

Tek Bahadur Ghimire

1 Introduction

Rule of law, smart, efficient, and effective corruption free administration, decentralization, transparent financial system, and effective management of public services and resources are basic norms for good governance. Maintaining good governance in a country is not possible without effective application and sustainable management of information and communication technologies (ICT) in public service sector.¹ ICT application helps to provide time and cost effective service, ubiquitous monitoring process and omnipresent public service for all. Because of these ICT provided services, the e-Government system has gained immense popularity. E-Government is no longer an option; it is inevitable.² For governments, the question now is not whether they are going to provide electronic services, but how and when they are doing so. Effective implementation and sustainable management of e-Government is more important than applying ICTs in public service sector.

Governance that does not observe the rule of law cannot be even imagined. The rule of law refers to the principle of governance in which all stakeholders are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated.³ Supremacy of law, equality before law, accountability to law, fairness in the application of law, participation in decision-making process and legal

¹S.A. Hazlett and F. Hill, “e-Government: The Realities of Using IT to Transform the Public Sector”, 13(6) *Managing Service Quality*, 2003, pp. 445–452.

²D. Patterson and W. Hanson, “21st Century Government: Principles for Transformation Government Technology”, 2001, available at: <http://www.erepublic.com/publications/21stCentury/intro.phtml> [accessed on April 12, 2009].

³“Report of the General Secretary of United Nations on The rule of Law and Transitional Justice in Conflict and Post-conflict Societies”, 2004, available at: <http://www.undp.org/cpr/documents/jssr/ssr/rule%20of%20law%20and%20transitional%20justice.pdf> [accessed on July 12, 2009].

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certainty, avoidance of arbitrariness and procedural and legal transparency are basic norms of the rule of law. In short, rule of law centers on the fact that everything should be done in accordance with law.⁴ Therefore, e-Government application cannot be immune from the application of the rule of law, which is a regulative ideal, not a mirror of what is done.⁵

2 E-Government System

E-Government is an efficient use of Information and communication technology (ICT) by the government for the functioning and support of its operations. It facilitates interconnection between the government and its agencies (G2G), government and citizens (G2C) and government and businesses (G2B).⁶ It helps to reform the management of public administration,⁷ boosts up government's ability to reach to the downtrodden people, strengthens citizen participation and trust of government,⁸ and improves quality of service,⁹ increases government efficiency and effectiveness by streamlining the process.¹⁰ E-Government reduces the layers of bureaucracy and fosters transparency,¹¹ and accountability helps in revenue growth,¹² and enhances the research capability by strengthening the digital resource management. It reduces corruption in several ways: "it takes away discretion,

⁴F. Schauer, "Rules and the Rule of Law", 14(3) *Harvard Journal of Law and Public Policy*, 1991 at 645.

⁵Jr. Fallon and H. Richard, "The Rule of Law As a Concept in Constitutional Discourse", 97(1) *Columbia Law Review*, 1997, pp. 1–56.

⁶S.A. Mousavi, E. Pimenidis and H. Jahankhani, "Cultivating Trust—an Electronic-Government Development Model for Addressing the Needs of Developing Countries", 1(3) *International Journal of Electronic Security and Digital Forensics*, 2008, pp. 233–248.

⁷C. Wescott, M. Pizarro and S. Schiavo Campo, "The Role of Information and Communication Technology in Improving Public Administration", 2001, available at: http://www.adb.org/Documents/Manuals/Serve_and_Preserve/Chapter19.pdf [accessed on October 25, 2009].

⁸Info Dev., "E-Government Toolkit and Portal", 2008, available at: <http://egov.sonasi.com>, [accessed on December 15, 2009].

⁹F. Teicher, O. Hughes and N. Dow, "E-Government: A New Route to Public Sector", 12(6) *Managing Service Quality*, 2002, pp. 384–393.

¹⁰T.B. Andersen, "E-Government as an Anti-Corruption Strategy", 21(3) *Information Economics and Policy*, 2009, pp. 201–210.

¹¹V. Pina, L. Torres, and B. Acerete, "Are ICTs Promoting Government Accountability? A Comparative Analysis of e-Governance Developments in 19 OCED Countries", 18(5) *Critical Perspective on Accounting*, 2007, pp. 583–602.

¹²S. Basu, "E-Government and Developing Countries: An Overview", 18(1) *International Review of Law, Computers and Technology*, 2004, pp. 109–132.

thereby curbing opportunities for arbitrary action".¹³ After all, e-Government is imperative to maintain trustful relationship between the government and its constituencies.

2.1 E-Government in Developing Countries

Most of the developing countries have "deficient e-Government capacity" since they have differences with respect to geographical adversity, infrastructure availability throughout their territory, socio-economic standard, and technology application managerial capacity.¹⁴ Shin argues for the need of empirical studies to justify that the success and failure factors of e-Government projects in developing countries are uniquely different from those in developed countries.¹⁵

2.2 Success and Failure Story of E-Government System in Developing Countries

While some developing countries have taken initiation to transform the government into digital form, they often fail to meet their expectations in improving their governance system and achieving expected outcomes.¹⁶ One of the reasons for such a failure is the lack of comprehensive regulatory framework and good coordination between regulation implementing agencies.¹⁷

According to Heeks, e-Government in developing countries fails with 35% being classified as total failures and 50% partial failures.¹⁸ Different economic, social and

¹³S. Bhatnagar, *E-Government: From Vision to Implementation: A practical Guide with Case Studies*, 2004, available at: http://www.amazon.co.uk/gp/product/0761932593/ref=sib_rdr_dp [accessed on January 12, 2009].

¹⁴T.B. Ghmire, A Ph.D. dissertation on Regulatory Policy Factor Impact on Cultivation of Public Trust in e-Government System in Nepal, (2011) submitted to Seoul National University, Information Technology Policy Program, available at: *library.snsu.ac.kr*.

¹⁵Shin, S., Song, H. and Kang, M., "Implementing E-Government in Developing Countries: Its Unique and Common Success Factors", 2008, Paper presented at the annual meeting of the APSA Annual Meeting, Hynes Convention Center, Boston, Massachusetts, 12 November, 2010, available at: http://www.allacademic.com/meta/p280176_index.html [accessed on December 20, 2009].

¹⁶R. Heeks and S. Bailur, "Analyzing e-Government Research: Perspectives, Philosophies, Methods, and Practices," 24(2) *Government Information Quarterly*, 2007, pp. 243–265.

¹⁷UNDESA, C. Batini "Application Architecture, Regulatory Framework and e-Readiness in the e-Model", 2005, available at: <http://www.parliaments.info/downloads/17%20Carlo%20Batini%20Annex%205%20%20Application%20architecture%2C%20regulatory%20framework%20%20and%20ereadiness%20issues%20in%20the%20eModel.pdf>, [accessed on November 28, 2008].

¹⁸Supra note 16.

political circumstances may have a determining effect on the realization of e-Government objectives.¹⁹ Apart from failure cases, there are several reasons for the slower adoption of ICT by public sector institutions in developing countries. The Government has a responsibility to provide leadership in developing a culture of privacy protection and security.

2.3 Indigenous Problems in Implementing E-Government System in Developing Countries

The developing countries might have different needs and objectives of implementing e-Government; they differ in their political aspirations and structure of government and, therefore, requirements and course of actions are different from the developed ones. Developing countries are nonhomogeneous with respect to technology availability, development, and its application. The gap between haves and have nots is wider in developing countries in comparison to the developed society.²⁰

Despite the fact that the governments around the world have invested huge amount of money for building e-society and managing e-public services, citizens particularly in developing countries are still not likely to use e-services, and are rather following the traditional methods, e.g., making a phone call, visiting government offices, and meeting in person. By nature, the service recipients in developing countries are more reluctant and skeptical to use e-Government services than others. Developing countries generally lag behind in a modern education system that can build robust human capital. Insufficient knowledge can lead to misuse of the electronic processes hindering the potential benefits of ICT use.

3 Enabling Public Trust in E-Government System

3.1 Trust in E-Government System

Rousseau defines trust as “willingness to accept vulnerability based upon positive expectations about another’s behavior.” According to Warkentin, trust is a crucial enabler affecting intention to use the services and sharing personal information. Government institution should assure trustworthy service which is important for citizen adoption. There must be trustworthy environment that mechanisms are able to guarantee secure collection store and transaction of private data and reduce the vulnerability of digital information transmission. Service provider bureau should

¹⁹*Supra* note 11.

²⁰*Supra* note 12.

take advantage of trust-building mechanisms used by operating and delivering reliable e-services, such as posting security and privacy seals and conducting awareness program to principal area of using e-services to encourage adoption of e-Government services.

According to info Dev, the issue of trust in e-Government involves two aspects: privacy and security.²¹ Privacy is about managing personal information transaction that the government collects about individuals, while security is about protecting Internet technology used in e-Government service from attack, misuse, and threat of loss of data. Their may be three types of trust: process-based trust, worth-mentioning characteristic-based trust, and institutional-based trust. In presenting e-Government initiatives in developing countries, the above-mentioned trust types need to be addressed. In process-based trust, citizens will look at their past experience with particular government agencies. In institutional-based trust, citizens will look at accountability of particular government agencies and in characteristic-based trust, citizens will look at the quality and reliability of service that they can get online.

The government as a service provider and manager of e-Government system must be able to ensure trust so that service recipients will be motivated to use e-Government service confidently. Public trust is the foundation of relationship between service providers and service recipients. Public trust is one of the critical success factors for e-Government through the system adoption. E-Government adoption and stakeholder's participation are inputs to foster sustainability in e-Government system. Thus, the need for building trust between the government and other stakeholders of e-Government is considered a fundamental principle in designing and developing effective e-Government system.

3.2 Role and Importance of Public Trust in Implementing Successful E-Government System

For effective implementation of e-Government service in developing countries, it is necessary to consider the issue of cultivating and enhancing citizen's trust to the systems.²² The trust of the government agency providing e-service is important for e-Government system development with high participation of stakeholders.

Public trust that enhances citizen's adoption of e-Government is imperative for the success of e-Government. Trust model literatures emphasize the importance of secured e-Government services. Empirical studies have found the lack of trust as a significant barrier to the adoption of e-Government.

²¹Info Dev., "E-Government Toolkit and Portal", 2008, available at: <http://egov.sonasi.com>, [accessed on December, 25, 2009].

²²Supra note 6.

E-Government will only be adopted if citizens deem them trustworthy. In developing an e-Government project, it is essential to build trust between different stakeholders. Yu stated that citizen's trust is becoming an increasingly important issue in the design of information system in a country.²³ Trust and commitment are central mediating agents of any online relationship between service provider and recipients.

Without customers' confidence and trust, the vision of fully electronic service delivery will remain a challenge. So, there is a strong incentive to ensure that the trust model is robust, reliable, and enjoys a high confidence level. The concept of trust is crucial because it affects a number of factors which are essential for e-transaction. Teo and Liu conclude that trustworthy relationships must be developed between different associated parties.²⁴

There are many challenges to establish trustworthy and reliable government information system in developing countries. Reliable government information system has a chain effect to make a successful e-Government system. Reliable information system encourages e-Government adoption. The adoption itself is a participation in the system which empowers government to implement digital information system in public sector. Citizen's participation has significance for the success of e-Government.²⁵ A key issue in improving user participation is increasing citizen trust.²⁶

4 Comprehensive E-Government Laws for Enhancing Public Trust in E-Government System

Establishing a comprehensive legal regulatory regime is one of the critical issues that have often been overlooked.²⁷ E-Government should be first supported by national laws and regulations for the sake of its legitimacy and legality.²⁸ Governments must ensure that e-Government is preceded by changes in the legal system to protect information and privacy in the digital age. At the same time,

²³Yu, E. and Liu, L. "Modeling Trust for System Design Using the *i** Strategic Actors Framework", 2246 *Lecture Notes in Computer Science*, 2001, pp.175–194 available at: <http://www.springerlink.com/content/m0dhlewf8wby3f97/> [accessed on December 15, 2009].

²⁴T.H.S. Teo and J. Liu "Consumer Trust in e-Commerce in the United States, Singapore and China", 35(1) *The International Journal of Management Science*, 2007, pp. 22–38.

²⁵*Supra* note 6.

²⁶*Ibid.*

²⁷*Supra* note 11.

²⁸Y.A. Mohammad, "e-Government: A proposed Legal and Regulatory Framework", 2004, available at: http://www.alemlaw.com/EGovernment_Legal_Framework.pdf, [accessed on November 5, 2008].

criminal codes need to be upgraded to incorporate cyber-crime and the stealing of electronic data. The legislation governing intellectual property rights must be amended to include the protection of e-content ownership.

Legal and regulatory management is one of the fundamentals to indicate the level of e-Government affordability in a country. Adequate regulatory management enhances reliability and helps to cultivate public trust. Public trust which enhances both stakeholders' participation and system adoption is one of the critical success factors for e-Government system. System adoption and stakeholder's participation foster sustainability in e-Government system. Therefore, for effective application and sustainable management of e-Government in developing countries, it is essential to investigate the factors impact on cultivating public trust in e-Government system.

E-Government system should be reliable and reliability can be maintained by adequate existence and proper implementation of e-Government laws. Data protection regulation is a bridging factor to maintain a good relation between the government and the people in other word, e-Government service provider (manager) and e-Government service recipients.

A comprehensive legal system, which ensures the security, safety, and privacy of citizens and businesses, can play a pivotal role to successful application of e-Government by building citizen trust. The failure in building trust may lead to the failure in obtaining citizen participation. Managing comprehensive law for e-Government application is one of the critical issues which have often been overlooked.²⁹ It is crucial for e-Government success both in terms of affordability and long-term sustainability.

4.1 Two Approaches of E-Government Law in Practice

There are two approaches of e-Government regulation: specialized and fragmentary.³⁰ The specialized regulation approach adopts specific uniform provisions covering fundamental legal principles, requirements, and the management of e-Government activities. Such approach usually governs the basic legal regulatory norms specifically directed to e-Government, its development processes. Most of the developing countries do not have specific form of laws for e-Government system management. One of the examples of such specific e-Government law is in Sweden—known as “*loi sur le guichet sécurisé unique*” or LGSU, which regulates all e-Government transactions. The act describes the whole system of e-Government: competent bodies, data protection implications, architecture of the system, costs, responsibility, and so on.

²⁹Supra note 11.

³⁰Supra note 28.

4.2 Data Protection Scheme is One of the Crucial Elements of Comprehensive E-Government Law

Personal data management is one of the factors which indicate a level of e-government affordability. Such elements should be carefully examined, considered, and applied before the effective implementation of e-Government. E-Government requires the establishment of a range of suitable legal and regulatory measures.³¹ Privacy protection and security management are important issues conjoined with public trust in e-Government system.³²

Key factors identified for information security management issue in developing countries are security culture, security and privacy legislation, management commitment and user awareness, skills and training, management change and information security infrastructure. Citizens are not likely to use e-Government service if there is no assurance that their personal data will not be misused and no unwanted secondary use will be made to it.

A country becomes ready to adopt e-Government when there is an existence of an enabling legal framework encompassing privacy and security of digital data, legal sanction of new forms of storage and archiving, and laws that accept paperless transactions. Privacy and security provisions need to be ensured before initiating e-Government application in a country.

Secured seamless communication and information flow and data management are the fundamentals of an effective application and sustainable management of e-Government. It requires reasonable assurance of not being victimized by illegal activities during information transaction between e-Government constituents. In this regard, it is important to obtain sufficient safeguards in order to ensure security of data and privacy protection.

Lack of information security and privacy has been identified as two major hindrances to implement e-Government system at a smooth pace. To gain users' trust in e-government and to prevent fraud in the use of personal information, a government must consider how to limit the sharing of personally identifiable information with natural and legal persons so that the user does not provide the information to both inside and outside the government. Management of digital privacy is one of the prominent issues for e-Government adoption through public trust cultivation. If the managers of e-Government have guaranteed online processing with reliable service citizens begin to develop trust in technology and the government agency as well. Finally, it may increase service recipients' willingness to use e-Government service continuously.

At the heart of concerns about public trust in e-Government, there is a “trust tension” between the need to collect data on individuals as the basis of providing services, such as health records and personal financial transaction and fears of data

³¹Supra note 11.

³²Supra note 14.

scrutiny as well as unwanted secondary use of personal information during the digital transaction in e-Government service.

Mousavi recommend that the issues related to privacy and security have to be analyzed and considered before making the government information online.³³ The government should prioritize the issues to be addressed for sustainable management of e-service at an early stage of the design phase, failure to which may negatively affect in gaining public attraction. Besides, cultural awareness toward the cultivation of trust environment and overcoming citizen's apprehension is equally important along with the implementation of e-Government technically.

4.3 Right to Information versus Right to Privacy

Citizens are unlikely to use e-Government services without the guarantee of privacy and security. The government as an e-Government manger has two divergent responsibilities: guarantee of equal access to the public information for all and protection of right to privacy during e-service transaction. Prins mentions that "data efficiency" has become an important challenge to resolve the inherent conflict privacy with data protection, with a clear emphasis on "better" use of personal data to deliver smarter and more trusted e-Government services.³⁴ It is a challenging task to balance between privacy and convenience. In other words, it is difficult to retain a balance between right to information and right to privacy in practice.

Right to privacy is internationally recognized human right according to Article 12 of the Universal Declaration of Human Rights 1948 and Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

Information privacy can be understood as "right to be let alone," the right of controlling information about oneself and, conversely, the right to prevent non-consensual access to information about oneself. An individual has the right to control the conditions under which information pertaining to him is collected, used, and disseminated. Governments must ensure that e-Government is preceded by changes in the legal system to protect information and privacy in the digital age.

With heightened awareness of online privacy, public trust has become one of the most critical aspects for e-service success. There are four components of public trust which must be kept in mind while using e-Government services.

1. Privacy policy for personal or proprietary information provided online;
2. Confidence that personal information will not be misused;
3. Safeguarding privacy and security in e-transaction of public information;
4. Controlling mechanism for unwanted secondary use of personal data;

³³*Supra* note 6.

³⁴C. Prins, "E-Government: A Comparative Study of the Multiple Dimensions of Required Regulatory Change", 11(3) *Electronic Journal of Comparative Law*, 2007, at 19.

Security and privacy protection issues are identified as supply side barriers for effective implementation of e-Government system. Many developing countries have yet to consider adopting adequate legislation related to information security that identifies cyber offences and enables investigation bureau to investigate and prosecute against such activities.

5 Case Studies

5.1 Observation of International and Regional Standards of E-Government Laws

Governments' inability to protect digital privacy for system users will make them reluctant to provide their personal data and to consider the government as a potential threat to their privacy. The government as a system manager has a big challenge to protect personal privacy by obtaining various preventive and curative measures such as security threads and assurance of compensation for the victims. The loss of confidence in government's ability to protect individual's confidentiality has a serious consequence for citizen's trust and participation in e-Government system.

The increased demand of society for the protection of privacy and personal data has led several countries to develop their own privacy laws, for example the Australian Privacy Act, 1988,³⁵ Finnish Personal Data Act, 1999³⁶ and Open Government Data Guide Book, 2010, Korean Electronic Transaction Act, 1999³⁷

³⁵The Privacy Act, 1988 in Australia regulates 'information privacy'. It covers information privacy principles which are "the base line privacy standards the Australian and ACT government agencies need to comply with in relation to personal information kept in their records", National privacy principles "are the base line privacy standards which some private sector organizations need to comply with in relation to personal information they hold" like public interest determinants, privacy code and opt-ins, privacy regulations (The regulations assure that data collected by the Australia Statistics shall not be revealed and used for any purpose except statistical purposes): Australian Government, office of the privacy commissioner (<http://www.privacy.gov.au/law>).

³⁶The objectives of Finnish Act are to implement, in the processing of personal data, the protection of private life and the other basic rights which safeguard the right to privacy, as well as to promote the development of and compliance with good processing practice available at: <http://www.tietosuoja.fi/uploads/hopxtvf.HTM> [accessed on November 15, 2008].

³⁷The main purpose of this Act is legal recognition and management of digital signature, digital privacy and security. available at: <http://www.oecd.org/dataoecd/13/41/2092960.pdf> [accessed on November 25, 2008].

and Consumer Protection Act on Electronic Transaction, 2003, Singaporean Electronic Transaction Act, 1998,³⁸ Swedish Personal Data Act, 1985.³⁹

At regional and international level the UNCITRAL Model Law on Electronic Signatures, 2001⁴⁰ recommends that countries adopt laws allowing the enforceability of electronic signatures subject to a risk assessment with regard to reliability and trustworthiness. Similarly, the Organization for Economic Cooperation and Development (OECD) and European commission has their own documents: OECD guidelines on the Protection of Privacy and Trans border Flows of Personal Data, 1980 and European data protection directives, 1995, respectively.

Data Protection Act in Germany is one of the best enactments of legal regulation to enhance citizen's confidence to the digital public information system. Personal data can only be raised, stored, and used in a restricted manner by informing the concerned individual about the purpose and prospective use of collected personal data.

5.2 *Observation of E-Government Failure Cases Due To Lack of Data Protection Scheme at Initial Stage*

Juki Net or Residents' Registry Network System (Jyuminkihondaichou) is a national ID and information system, based on a database in Tokyo, intended to link personal information consisting of the national 11-digit ID number assigned for all Japanese citizens.⁴¹ When Japan introduced Jukinet, no agency was established for settling privacy and information security issues. The users were not confident that their data would be secured; therefore, they waged a movement against providing their personal data to the system.⁴² Different state courts also ruled in favor of people's right to privacy; they were not bound to furnish their personal data to the

³⁸Electronic Transaction Act, 1998 in Singapore, is one of the earliest enactments of the Cyber law in the world. Enacting such an effective Act has served as a trust booster and is one of the prime reasons for Singapore being a leader in implementation of e-Government initiatives.

³⁹The main purpose of this Act is to protect people against the violation of their personal integrity by processing personal data available at: <http://www.freedominfo.org/documents/sweden%20personal%20data%20act-eng.pdf> [accessed on November 20, 2008].

⁴⁰Model Law aims at bringing additional legal recognition to the use of electronic signatures and it establishes criteria of technical reliability for the equivalence between electronic and hand-written signatures. The Model Law follows a technology-neutral approach, which avoids favoring the use of any specific technical product. The Model Law further establishes basic rules of conduct that may serve as guidelines for assessing possible responsibilities and liabilities for the signatory, the relying party and trusted third parties intervening in the signature process, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html. [accessed on November 15, 2008].

⁴¹The Japan Times Online (2007), available at: <http://search.japantimes.co.jp/cgi-bin/nn20070202a5.html> [accessed on June 13, 2008].

⁴²Ibid.

system until and unless the government would address privacy and security issues with strong and confident provisions. Finally, when the bill related to right to privacy and information security was passed by the Japanese parliament and the agencies were also established to execute those legal regulatory provisions in 2006, the Jukinet adoption has increased and the system becomes successful.

Canadian Government Departments have conducted privacy impact assessment policy (PIA) in order to determine whether privacy issues are raised by proposals for new programs and services or by a substantial redesign of a program or the way it is delivered to the public. It is based on privacy principles common to all data protection régimes. These principles are enumerated in the “Code of Fair Information Practices.” PIA takes a close look at how government departments or e-Government administrators protect personal information as it is collected, stored, used, disclosed, and ultimately destroyed. These assessments help to create a privacy sensitive culture in government departments to reduce those risks. PIA provides a framework to ensure that privacy is considered throughout the design or redesign of programs or services. Privacy implications and risks may arise because of the intra-institutional, inter-institutional, or cross-jurisdictional flow of personal information.

6 Conclusion

Studies have shown that establishment of good governance system is not possible without effective application and sustainable management of ICT application in both public and private sector. E-Government is a comprehensive package of ICT use by the government for the functioning and support of its operations. E-Government survey has highlighted the higher percentage of e-government failure cases in developing countries as compared to developed ones. They have “deficient e-Government capacity” as they are facing problems relating to geographical adversities, unavailability of ICT infrastructure, lack of ICT knowledge, and education on benefit of ICT usage in public sector. They have wider gap between haves and have nots, and they are lacking behind to analyze the need of specific e-Government law before starting digital information system in government service. They have been late in analyzing the factors impact on e-Government success and solve the problem. Trust model literatures suggest that the public trust is one of the important factors for e-Government success in developing countries. Public trust has a kind of chain effect to make e-Government successful in developing societies. Public trust enhances citizen’s participation. Which in turn motivates government to make more investment in establishing e-Government system and increased participation of service recipient itself is a good sign of e-Government success in a country. Thus, comprehensive legal regulatory mechanism is needed to foster public trust and digital privacy and personal data protection scheme has become unavoidable necessity.

Chapter 28

Law Relating to Information Technology in Nepal: An Overview

Laxmi Narayan Dhungel

1 Introduction

Nepal needs to base its national information technology strategy on a much greater consideration of local cultural and social issues. The government has a major role to play if the country wants to stand in the information arena, although information technology covers a wide range of technologies in general. Information technology as a tool of social and economic development is a significant issue for developing countries like Nepal. Through declining hardware costs and increasing benefits, information technology has been spreading into developing countries. There is a rapid expansion in the use of information technology in any sector of the economy particularly in public organizations. However, this usually occurs with external aid and assistance. As late comers to the information technology scene, developing countries like Nepal face enormous difficulties, perhaps the most important being that they are becoming users of information technology without building up the necessary infrastructure, planning, laws, and manpower to support it.

In Nepal, especially the public sector technologies come as a package with development projects from various donor agencies. These projects have primarily focused their activities on the development and delivery of specific outcomes within specific time frames. Little or no provision has been made for building the technological capability of the recipient organizations to sustain the use of the new technology beyond the lives of the projects.

Actually in Nepal the policy instruments and the relevant authoritative agencies are failing to guide and regulate the technology acquisition from both internal and external sources in a way to maximize the benefits and advantages of imported technologies for building up its own technological capacity. In Nepal, the major obstruction for development and wider application of information technology is the

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fact that the major part of the country consists of high mountains and rolling hills and also that Nepal is an ethnically complex society, yet information technology is of critical importance for a number of reasons for a small land locked country like Nepal.

Nepalese Government has initiated a number of efforts to give a direction to information technology application and development in the country. This includes a plan to establish a national computer training program to encourage research activities in software development to create a national information bank and develop a networking system to disseminate and collect data and information.

The Interim Constitution of Nepal 2007 has guaranteed the right to information and right regarding publication, broadcasting and press, as fundamental rights to Nepalese citizens. The Right to Information Act, 2007 has been enacted for the enforcement of constitution right to information. For the protection of right to information and regulation of medium of communication and business transactions, information technology laws are also enacted in Nepal.

Nepal has enacted the Radio Act, 1957; the Communication Corporation Act, 1972; the National Broadcasting Act, 1993; the Telecommunication Act, 1997; the Electronic Transaction Act, 2008; the Foreign Investment and Technology Transfer Act, 1992; the Copyright Act, 2002; and the Information Technology Rules, Policies, etc. For the implementation of the provisions of the acts, rules, and policies “High Level Commission for Information Technology” is also formed by the Nepal Government. The following part provides an overview of the laws relating to information technology.

2 Major Provisions of Information Technology Laws

2.1 *The Electronic Transactions Act, 2008*

The law in its preamble proposes to make legal provisions for the recognition, validity, integrity, and reliability of generations, production, processing, storage, communication, and transmission system of electronic records by making the transactions to be carried out by means of electronic data exchange or by any other means of electronic communications, reliable and secured, and for controlling the acts of unauthorized use of electronic records or of making alterations in such records through the illegal manner.

Section 42 of the Act provides for the “Liability of Network service providers”. According to this section, intermediaries providing their services as network service providers shall undertake the following liabilities in regard to service provided by them: liabilities referred to in the agreement made with the subscriber in regard to service provision, liabilities referred to in the license of network service providers, and any such other liabilities prescribed in this regard.

According to Section 43, no network service provider shall be liable to bear any criminal or civil liability arising from any fact or statement mentioned or included in the information or data of the third party made available in electronic form by him or her, merely on the ground that he or she has made available the access to such information or data. Provided that, such a person or institution providing network service shall not be relieved from such liability, if he or she has made available access to such information or data with the knowledge that any fact or statement mentioned or included in such information or data contravene this Act or rules framed under the Act.

Chapter 9 of the Act details the offence relating to computer. Section 44 provides that if any person knowingly or with *mala fide* intention, pirates, destroys, alters computer source code to be used for any computer program, computer system or computer network or cause other to do so he or she shall be liable to the punishment with imprisonment not exceeding 3 years or with a fine not exceeding two hundred thousand rupees or with both.

Section 45 provides that if any person with an intention to have access in any program, information, or data of any computer uses such a computer without authorization of the owner or the person responsible for such a computer or even in the case of authorization performs any act with an intention to have access in any program, information, or data contrary to such authorization such a person shall be liable to the punishment with the fine with imprisonment.

Section 46 provisioned about the damage to any computer and information system. According to this section, if any person knowingly and with a *mala fide* intention to cause wrongful loss or damage to any institution destroys, damages, deletes, alerts, disrupts any information of any computer source by any means or diminishes value and utility of such information or affects, it injuriously or causes any person to carryout such an act, such a person shall be liable to the punishment with the fine.

According to Section 47, if any person publishes or displays any material in the electronic media including computer, Internet which are prohibited by the prevailing law or which may be contrary to the public morality or decent behavior or any types of materials which may spread hate or jealousy against anyone or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, and communities shall be liable to the punishment.

According to Section 48, if any person who has an access in any record book register, correspondence, information, documents or any other materials under the authority conferred under this Act or rules framed hereunder divulges or causes to divulge confidentiality of such record books registers, correspondence, information, documents or materials to any unauthorized person, shall be liable to the punishment with a fine not exceeding 10, 000 Rs. or with imprisonment not exceeding 2 years or with both, depending on the degree of the offence.

According to Section 49, any person with an intention to obtain a license from certifying authority under this Act or with an intention to obtain Digital Signature certificate or with any other intention conceals statement knowingly or lies any statement to be submitted to the certifying authority shall be liable to the punishment.

Chapter 10 details about the Information Technology Tribunal. It provides that, the Government of Nepal shall, in order to initiate the proceedings and adjudicate the offences concerning computer constitute a three-member Information Technology Tribunal. According to Section 60, subsection (4) any person aggrieved by an order or a decision made by Tribunal may appeal to the Appellate Tribunal.

Chapter 11 of the Act provides for the Information Technology Appellate Tribunal. In order to hear the appeal against the order or the decision made by the tribunal and to hear the appeal against the decision or order made by the controller or by the certifying authority, the Act provides for a three-member Information Technology Appellate Tribunal Consisting of one member each of law, information technology and commerce.

2.2 The Telecommunication Act, 1997

In order to make the telecommunication service reliable and easily available to the public, to involve private sector in telecommunication service and to regularized and systematize such service, Parliament enacted the Telecommunication Act, 1997. Section 2 of the Act defines “Telecommunication Line” as any wire, cable, equipment, tower, mast antenna, tunnel hole, pit, pole or other structure or object used or to be used in connection with a Telecommunications system. In the same way “tele-communications service” means a service relating to the act of the Conveyance or reception of any sounds, signs, signals, writings or images by the wire, radio, optical or other electromagnetic system whether or not such signs, signals, writings, images, sounds or intelligence have been subjected to rearrangement, computation, or other change in any manner for their emission, transmission, or reception.

In Chapter 2 of the Act, provisions have been made for the establishment of Telecommunication Authority. According to Section 14 of the Act, the Authority shall determine the quality and standard of the machine, equipment and facilities relating to the Telecommunications and the Telecommunications services. The Authority shall prescribe the minimum standard to be maintained for obtaining license for operating the telecommunication service.

2.3 The National Broadcasting Act, 1993

The law provides for the broadcasting without any obstruction, of the information in order that the general public get informed about impartial as well as authentic news and information taking place at the national and international levels by making the broadcasting media reliable, effective, and strong with the use of modern technology available in the field of information and communication.

Section 5 of the Act provides that any person or body corporate who intends to broadcast any program by way of satellite, cable, or other means of communication or to broadcast any educational, entertainment, and informative programs may do so by establishing the frequency modulation broadcasting system in any place within Nepal.

Section 9 of the Act makes special provision for the establishment of earth station. According to Section 9 (1) any person or corporate body or a native and foreign person or corporate body in joint investment who intends to broadcast any program by establishing the earth station relating to satellite and cable television has to submit an application to Government of Nepal for permission.

2.4 *The Radio Act, 1957*

The law has been enacted with an objective to maintain peace, order, and decency of the general public, by controlling and regulating activities of holding, making, and using radio machine in Nepal.

Section 2 of this Act provides the definition of the “Radio machine”. It means the following machines used for receiving or sending words, pictures, or signals continuously through radio waves without wire connection: (i) All kinds of satellite, receiving systems including disc antennas; (ii) following machines of frequency ranging from 30 Kilo hertz to 3000 gig hertz, falling under radio spectrum: (a) L.F, M.F, H.F, V.H.F, U.H.F, S.H.F, E.H.F. transmitter as well as communication means. (b) Radio transmitter (c) Television transmitter (d) Wireless transmitter (e) Walkie-talkie (f) Cordless telephone (g) Video sender (h) Amateur radio (i) All kinds of satellite communication devices including inmarsat; (iii) Cordless microphone; (iv) Radio control toys and models; (v) Radio receiver television receiver, video monitor; (vi) such machine as may be specified as the radio machine by Government of Nepal upon publishing Notification in the Nepal Gazette, from time to time.

2.5 *The Information Technology Policy, 2000*

The information technology policy has been formulated to achieve the objectives to make information technology accessible to the general public and increase employment through this means, to build knowledge-based society, and to establish knowledge-based industries.

The major provisions of the policy include fixing the strategies for the development of Information Technology, to make the action plan for the development of information technology, to formulate the National Information Technology Development Council as a Institutional body, and to established the National Information Technology Center.

3 Conclusion

Information technologies are the product of developed countries, and to make that technology suitable for developing countries, like Nepal, there should be an effort to build the capacity to recognize the importance of implementing information technology according to local development needs. Formulation of appropriate information strategy, policy, and laws which are favorable and supportive to a devolving country can make information technology useful for overall progress.

Furthermore, the problem is not about getting technology in the developing country like Nepal, but the major problem relates to managing the information technology in a particular environment. There is no single best procedure for managing information technology, since it depends on external social, economic, political culture, and legal factor that vary from one country to another, as well as on internal force like organizational culture and skills that vary from one organization to another. Therefore, there is a great need for clear legal provisions and academic research in the field of Information Technology in developing countries like Nepal. It is clear that for the developing country, simply trying to follow another country's model for the Information Technology laws may not produce expected results.

Therefore, if Nepal wants to gain a place on the global Information Technology map, the country will need to develop strong, coherent, well designed, and comprehensive national strategy with specific programs, policies, laws, and institution to accumulate skill and build market.

Chapter 29

Analysis of Law Relating to Cybercrime in Nepal

Balram Prasad Raut

1 Introduction

Science, technology, and law share unique relationship. Technological advancement has tendency to alter human relations and social ethos, posing new challenges to the existing laws in the context of society. As the function of law is to regulate social conflicts and deliver justice, law must be restructured to meet the exigencies and suit itself to cater to the new issues that have science and technological derivatives. The passing of the Indian law titled, Information Technology Act, 2000 is one such example that was implemented to give legal recognition to electronic revolution that created novel method of legal transactions and also opened new forms of human interactions that needed to be recognized and regulated. The science and technological innovations have twin implications. On one hand, ethical use may bring unprecedented benefits to the society, and on the other hand they may become a cause of destruction. Hence, the Law must promote the boon and eliminate the bane caused by science and technological revolutions by means of social engineering and balancing of conflicting interests.¹

Information and Communication Technology (ICT) resulting from computer and Internet systems has opened up new vistas and created a form of cyberspace that is borderless and virtual in nature.² Information and communications flow more easily around the world. This causes difficulty, as the Internet-based society has no physical boundaries and thus much traffic escapes national supremacy. Criminals

¹Durgambini Patel, “*Digital Revolution and Good Governance—A New State in Making*”, Paper presented in the 13th ICT Conference held on February 8–9, 2013 in Kathmandu, Nepal, organized by Computer Association of Nepal and Internet Society Nepal Chapter, Kathmandu.

²Ibid.

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are increasingly located in places other than where their acts produce effects. Between years 2000 and 2005, the average Internet user growth rate was of 183.4 present, the highest rate being in the Middle East with 454.2 present. It is clear from these statistics that these regions, consisting of mostly the developing countries subsist, are eager to implement and exploit the advantages of Information and Communication Technologies and the Internet superhighway.³

The developing countries are entering into the Internet world at a good pace but the overall awareness level regarding the cybercrime and the Internet crime is low in these countries. Different National Governments in Asia have yet to initiate action *vi-a-vis* Internet and cyberspace. Asian countries have to respond at the same lightening speed like that of Internet to reduce the cybercrime.⁴

Computer crime generally refers to criminal activity where computer or network is the source, tool, target, or place of a crime. Unlike the traditional crimes which are committed by individual against individual cybercrime, a computer comes between the perpetrator and victim.

According to the data of the population census of 2012 of Nepal, the Internet users' percentage is 3.3 in Nepal and remaining 96.7 % people of Nepal do not have access to Internet. But according to the data provided by the Nepal Telecommunication Office, more than five million people are Internet users in Nepal. It means the percentage of Internet users is 19. But this data is based upon the mobile Internet users through GPRS. According to the data of population census, 7.28 % families have computer access and 64.63 % families have access of mobile. There is a huge gap between the Information and Communication Technologies (ICT) user in urban and rural areas. Almost 70 % information technology market is located in capital city Kathmandu. It is believed that the percentage of Internet users is higher than what is shown by government data. Few months ago, it was published in The Kathmandu Post daily English news paper that out of the total population of Nepal (two crores seventy lakh) the mobile subscribers will be 20 million in few months. According to International Telecommunication Union (ITU), 9 present Nepalese used Internet and 44 present had mobile SIMs in 2011.

It can be said from the above data that in Nepal, the number of users of cybertechnologies has been increasing. But, in Nepal, the concept of cyberlaw is still in rudimentary stage. Any discussion on the cybercrime must focus on aspects, such as perfect laws, regulating mechanism, well-trained judges, and public prosecutors and polices as well as defending lawyers. In Nepal, there are various specific statutes related with cyberlaw, such as: Electronic Transaction Act (ETA) 2007, Banking Offences Act 2008, Nepal Telecommunication Act 1995, Some Public (Crime and Punishment) Act, 1970, Organized Crime Ordinance

³Zibber Mohiuddin, "Cyber Law in Pakistan", Paper was presented in the workshop related with Cyber Law, 2012.

⁴Lokendra Sharma, *Criminal Law* (Lumbini Publication, Kathmandu, 2010) at 195.

2013⁵, etc., it is pertinent to note that these laws are not effective and efficient because the law fails to incorporated all the new developments of ICT, further the institutions which have been authorized to apply and implement these laws are not well trained and well equipped with modern technology to deal with the problems associated with cyberspace.

2 Historical Development of Information and Communication Technology in Nepal

In Nepal the computer technology was for the first time used in population census in 1971 for data analysis and interpretation. The model of the computer used was IBM 1401. Realizing the importance of computer, the National Computer Centre was established. The computer was used for election purpose for the first time in 1990. In Nepal, in real sense, the ICT started in 1993 when the Internet service was started.

3 Status of Cybercrime in Nepal

Types of cybercrime complaints recorded in Central Investigation Bureau (CIB) of Nepal Police⁶ suggested that mainly the social media are used to commit the crime. Facebook, YouTube, twitter, etc., are used for uploading and downloading the pornography or photos shot which are photographed in the private life of the victim. The criminals either try to defame the victim to create problem in their family life or relationship or to take the revenge when they are betrayed by the lover or beloved. Criminals create fake email ID or use the email ID of friends or some unknown persons for this purpose. Sometimes, criminals give direct threat to the victim or their family or family members. The social media sites are used for leaking the question papers of competitive entrance examination. Recently, the questions papers of entrance examination of Institute of Engineering, Tribhuvan University was published through Facebook.⁷ Types of cybercrime reported in Nepal including the following:

⁵Approved by the President of Nepal in February 2013, The Financial Action Task Force (FATF) compelled the Government of Nepal to make law relating to organized crime, otherwise Nepal Will be under the blacklisted, meaning thereby that Letter of Credit (LC) will not be accepted by other banks of the world.

⁶Based on the presentation made by Nepal Police on “*Cyber Crime in Nepalese Perspectives*” Police Head Quarter, Naxal, Kathmandu.

⁷The Central Investigation Bureau of Nepal Police, Press Released on 19/05/2012.

(a) *Extortion through fake email Id, Facebook, web SMS*

In October 2012, Central Investigation Bureau (CIB) of Nepal Police arrested a Nepali citizen who used to give threats to industrialists, bank employees, and others in the name of Mumbai underworld group to get the money.⁸ Many threat and extortion letters were sent by e-mails to individuals and companies for getting money. Many renowned companies received spam mails from proxy Hot mails, Yahoo, Gmail, demanding money in the name of mainly insurgents groups and so called armed groups.

(b) *Advertising the events through Facebook for sexual activities*

In September 2012, Central Investigation Bureau (CIB) of Nepal Police arrested a person⁹ who was involved in sending message through Facebook for holding the sexual activities. He had given the name of the event as “BUNGA BUNGA”. It was found that he also exchanged the naked pictures through Facebook.

(c) *Crime committed through mobile sending SMS/MMS*

In Nepal, there are many cases of crimes which involve SMS/MMS. Some of them have been registered in the court and some have been finalized by the court. These cases mainly relate to sending pornography to friend or some unknown person.

(d) *Crime Committed Through Voice Over Internet Protocol (VoIP)*

These crimes are of the most serious nature from revenue perspective. It causes tremendous economic loss to the government treasury. In Nepal, a large number of foreign telecom companies have been operating VoIP illegally. Bhola Kishore Dangol, believed to be the kingpin of illegal Voice Over Internet Protocol (VoIP) operation in Nepal, was arrested in India by Darjeeling police from Mirik, West Bengal for illegally installing transmitters and wireless equipment. Dangol is accused of operating illegal VoIP through Global Internet Services where he was the managing director, and causing damage of Rs. 865 million to the domestic telecom operators and government of Nepal. Preliminary investigation had shown that Dangol was trying to use VoIP technology to make international calls. He was operating under the name of Kishore Pradhan. He was representing Global International Service, Chinese Company. Central Investigation Bureau (CIB) of Nepal Police has started a campaign called “Operation Voice Fox” against the illegal call by-pass. Ever since the CIB started crackdown on VoIP racketeers, more international calls are coming to Nepal through international gateways. Nepal Telecom that used to receive 28–40 million minutes of international calls per month through its International Long Distance Gateways now receive over 50 million minute of calls per month. The Central Investigation Bureau of Nepal Police has traced more than six places within a month where the VoIP system was

⁸*Id.*, on 08/06/2012.

⁹*Id.*, on 11/05/2012.

used by the criminals illegally. In September 2012, CIB arrested two Bangladeshi citizens who were involved in VoIP operation illegally.¹⁰

(e) *Crimes committed through ATM card*

This is another serious crime in Nepal but no one has been convicted so far. One employee of Nabil Bank of Nepal was arrested by the police subsequently he was released on bail and the trial is in process. There have been many incidences of illegal use of ATM card. Sometimes there is piracy of PIN number of the customers of the bank. It was found many a time that the Bank Account is in Nepal and money is withdrawn from abroad.

(f) *Phishing scam*

It is a kind of banking offence committed through cybertechnology to know the bank account of others and then to transfer the amount in his/her name by the criminals. This type of crime is rampant in Nepal.¹¹ Hacking of newspaper's website and replacing the original content with threat to attack is also increasing. The cases of violation of copyright in online medium have also emerged as a serious problem.

Cybercrimes have an impact at three levels: individuals, organizations and society at large. Examples of crimes aimed at the three levels are mentioned below¹²:

Against individual property	Against organization	Against society at large
i. Computer vandalism ii. Transmitting virus iii. Unauthorized control/access over computer system iv. Intellectual Property crimes v. Internet time thefts unauthorized information	i. Unauthorized control/access over computer system ii. Cyberterrorism against the government organization iii. Distribution of pirated software etc.	i. Pornography (basically child pornography) ii. Polluting the youth through indecent exposure iii. Trafficking iv. Financial crimes v. Sale of illegal articles vi. Online gambling vii. Forgery

4 Efforts Towards Combating Cybercrime in Nepal

4.1 Legal Framework

There are some specific statutes which are regulating the cybercrime directly and indirectly.

¹⁰*Id.*, on 04/05/2012.

¹¹*Id.*, on 22/8/2012.

¹²*Supra* note 1.

(a) *Substantive Laws*

- i. Direct Law: The Electronic Transaction Act, 2006 is the only law which is directly related with the cyberspace and governing the cybercrime.
- ii. Indirect Laws: Laws which indirectly address the issue of Cyber Banking Offences Act, 2007; Telecommunication Act 1997, Organized Crime Ordinances 2013. The cybercrimes which are not covered by these laws are dealt with by Public (Crime and Punishment) Act, 1970; under Section 47(4) of Telecommunication Act, 1997 this provision if a person abuses, threatens, or causes unnecessary harassment through the telecommunications service [it includes Internet], the Authority may impose a fine up to 25, 000 Rs. on such person and may also cause to stop such service. Similarly, Nepal Telecommunication Authority (NTA) amended license of all the Internet Service Providers (ISP) in September 2010 and incorporated clauses that impose duty on ISPs to block certain websites. The Service Provider shall make arrangement to deny uploading, distributing, transmitting, commercial exchange (sale) and consummation (use) of content through Internet to its subscribers or future subscribers in certain cases.

(b) *Procedural Law*

Government Cases Act 1992 is the law which enlists many specific laws under its schedule to show that any liability arising under such laws will be investigated and prosecuted by the Government of Nepal.

Some soft legal provisions relating to cybercrime are as follows:

1. Information and Technology Policy, 2000.
2. Long-Term Policy and Communication Sector, 2003.
3. Telecommunication Policy, 2004.
4. Media Policy, 2012.
5. Ten-Year Master Plan (2011–2020) for the Development of Telecommunications Sector in Nepal.
6. E-Government Master Plan Report.

All the above policies and plans are directly or indirectly related with the ICT to some extent. But these are not specially made to deal with cybercrime. These are mainly related with the promotion of ICT services. These laws, policies, and plans are not effective and efficient to curb and control cybercrime, because the scope of these laws are very narrow and the horizons of cybercrimes are very wide. Therefore, the need to enact separate legislation deal with all the crimes related with cyberspace is strongly felt in Nepal.

4.2 Institutional Frameworks

(a) Investigating Agencies

- i. Nepal Police: Cybercrime come under the jurisdiction of Nepal Police because the Electronic Transaction Act, 2006 and Banking Offences Act, 2007 have been enlisted under Government Cases Act 1992. Central Investigation Bureau (CIB) has responsibility to look into cybercrimes. Nepal Police has got the authority for investigation. The Computer Directorate under the Headquarter of Nepal Police is the policy-making body of Nepal police in the IT sectors and it recommends to the Government of Nepal for reforms and improvements, so that Nepal Police can be well equipped according to the demands of the law and new development in IT sector. In addition to investigation, the Nepal Police has also been doing the following jobs to combat cybercrime:
 - a. Intervention through the use of wireless technology, mobile phones, proxy intelligence;
 - b. Deployment of trained police personnel;
 - c. Public awareness programs;
 - d. Law into swift enforcement and offender's publicity;
 - e. Immediate circulation of information about international criminals through INTERPOL; and
 - f. Cooperation with neighboring countries.
- ii. Inland Revenue Department: It does not have the authority to investigate cybercrimes. Its job is to pursue cases of tax avoidance and tax escape. It has filed few cases related to VoIP in district courts.
- iii. Department of Information and Communication: The department comes under the Ministry of Information and Communication and it is like a monitoring body of the Government of Nepal in the information and communication sector.
- iv. Nepal Telecommunication Authority (NTA): It is the main policy-making body in IT sector. It is an autonomous body established under the Nepal Telecommunication Act, 1995. NTA has the authority to give license to provide any type of services in IT sector, and at the same time it can cancel the licenses if any one violates the telecommunication law. It makes every types of IT polices and recommends the government to make IT services available to public.
- v. The National Information Technology Center (NITC): It was established in the year 2002 in line with IT policy, 2000 under Ministry of Science and Technology with the vision of developing and promoting Information Technology Sector of Nepal. But this center is still in crawling stage due to lack of sufficient budget allocation.

- (b) *Prosecuting Agency:* Cybercrimes come under the jurisdiction of Public Prosecutor because the Electronic Transaction Act, 2006 and Banking Offences Act, 2007 have been enlisted under Government Cases Act, 1992. This Act provides power to the public prosecutor to make the charge sheet on the basis of the investigation done by the Nepal Police and initiate prosecution in the Kathmandu district court. The Kathmandu district court is the only court which has been authorized by the government to the cases related to cybercrime.
- (c) *Case Hearing Institutions:* It is an ironical situation that the Government of Nepal has given the power to hear the case of cybercrime only to Kathmandu district court whereas cybercrimes are being committed every where in the country.

5 Analysis of Some Sample Cases

Various categories of cases, related with cybercrime, have been registered in Kathmandu district court by the Public Prosecutors of Government of Nepal. The statistics of the cybercrime indicates that the total numbers of cases related with ICT are 232. Out of which, 156 cases have been filed under the Electronic Transaction Act, 2006 58 cases have filed under the Telecommunication Act, 1997 and remaining have been proceeded under different laws, such as Banking Offences Act, 2007 and Some Public (Crime and Punishment) Act, 1970.¹³ It is important to note there is no umbrella legislation on the point of and the Electronic Transaction Act, 2006 has very limited scope and does not cover the wide scope of the cybercrimes.

5.1 Categories of Cases

(a) Defamation

In *Yuvaraj Sharma Shivakoti v. Narendra Devkota*, the defendant was caught by police on 2069-5-22 and the charge sheet was filed on 2069-6-12 at Kathmandu district court. The charge against the defendant was that the defendant sent messages using the abusive words and vulgar text to applicant. The applicant requested so many times to the defendant to refrain from such activities, but he continued to do it. Sections 47(1) and 76 of the Electronic Transaction Act, 2006 were applied. The case is pending before the district court.

In *Maya Rai (Disguised name of the victim) v. Tika Bahadur Magar and two others*, the defendant and his two friends captured the naked photo of applicant and blackmailed her and terrorized her by saying that if she does not fulfill their demand

¹³The Attorney General, Annual Report of 2011/12.

they will disseminate the picture all over the world. Applicant later complained it to the police and police took charge of the case. Sections 47(1) and 76 of the Electronic Transaction Act, 2006 were applied.

In *Sapana Thapa v. Bidhur Prasad Bhatta*, the defendant was caught by police on 2069-5-17 and the charge sheet of this case is submitted at the Kathmandu district court on 2069-6-11. The charges are that the defendant used the email ID to create Facebook account and uploaded sexual video clips and sent vulgar message to applicants' husband to spoil her character and tries to destroy the spousal life. The defendant has also sent the message to others in different names. Sections 47(1) and 76 of the Electronic Transaction Act, 2006 were applied in this case.

In *Police v. Kirtan Pokhrel*, the charge sheet was submitted in the Kathmandu district court on 2069-6-2 and the major charges were that the defendant created event called Bunga Bunga and advertised it through the Facebook by asking to pay 2000 Euro and to get the service of girl aged from 10 to 17. The New Zealand police found it on websites and requested to find in it out and later Nepal police looked in this matter and the case came into light. Sections 47(1) and 76 of the Electronic Transaction Act, 2006 were applied.

In *Rina Shrestha v. Raju Dangol*, the accused the photo of applicant scanned and publicly advertised it to harm the personal life of applicant. The relevant law was Sections. 46, 47(1) and 76 of the Electronic Transaction Act, 2006.

In *Shova K.C v. Bhojraj Lingden*, the applicant complained the police that unknown person has used her email ID and uploaded the naked photo of her in different sites. Police investigated the case and found a suspect to be involved in this activity. Sections 47(1) and 76 of the Electronic Transaction Act, 2006 were used in this case.

(b) Obscenity

The discussion of law of obscenity in the context of cyberspace can be seen in the case of *Nepal Government v. Ravi Kumar Kesari*, the charge sheet of this case was submitted in Kathmandu district court on 2069-6-3 and the major charges against the defendant were that the defendant had uploaded the video clips of sexual content in different sites which violate the moral and social law. This kind of activities can create the situation of confrontation between different caste and communities. Sections, 46, 47(1) and 76 of the Electronic Transaction Act 2006 are the relevant law.

In *Sadiksha Piya v. Manish Shrestha*, the charge sheet was registered at Katmandu district court on 2069-1-20 and the case was of hacking of password and uploading of naked photo by defendant. The act to hack other's password is illegal and it is prohibited by law and the criminal has used this method and uploaded the naked photo of victims which creates difficulty for her in life. The matter may be addressed by applying Sections. 44 and 47 of the Electronic Transaction Act, 2006.

In *Chhiring Sherpa v. Hari Parajuli alias Harry*, the charge sheet was registered on 2069-6-29 and the main charges were that the defendant used the victim's password of Facebook and sent the vulgar message, terrorized her and made her social life difficult and created difficulty for her to live a respected life in the society.

Section 44 and 47 of the Electronic Transaction Act, 2006 were the appropriate provision to be applied.

(c) *Political Criticism*

In *Police Government v. Basu Acharya*, the charge sheet was registered in Kathmandu district court on 2069-5-26. The major charges were that the defendants sent the email which had content of abusive and terrorizing nature in order to spread terror and fear in the public. They try to spread hate speeches to different professionals and political leaders in order to fulfill their personal purposes. Section 47(1) and 76 of the Electronic Transaction Act, 2006 were applied in the case.

(d) *Cyberbullying*

In *Maina Dhital v. Bikash Thapa*, on 2067-6-1 the Kathmandu district court granted the detention warrant to put the defendant in jail. And again on 2067-6-21 Appellate Court confirmed the order of Kathmandu district court. The major charges were that defendant has sent the complainant, obscene pictures and words to her email ID and harassed her. Sections 47(1) and 76 of the Electronic Transaction Act, 2006 were applied but later the defendant was found innocent and acquitted.

(e) *Unauthorized Access to Information*

In *Sabina Karki v. Suresh Sharma Adhikari*, the defendant misused the email ID for illegal access to closed document of the company to harm the good will of the company. Sections 44, 45, and 46 of the Electronic Transaction Act 2006 are the relevant provisions.

6 Conclusion and Suggestions

Thus in the context of cybercrime one must reflect on its various aspects, such as perfect laws, regulating mechanism, well-trained judges, public prosecutors, and polices in the field of ICT. Therefore, in Nepal, is a need to legislation umbrella law relating to cybercrime is strongly felt. At the same time, we also need to develop the infrastructure. It is important to note that before legislating on the issue, a detailed assessment of international practices and conventions need to be done. Indian initiatives in this area can be of immense use for Nepal.

6.1 Suggestions

(a) *Need for enactment of an Umbrella legislation*

In Nepal, the concept of cyberlaw is still in rudimentary stage and the debate about it is missing. In Nepal, the only law is Electronic Transaction Act, 2006 which was

enacted to regulate the cybercrime, but it proved to be insufficient to handle all the cybercrimes. The main reason is that there are so many laws in the ICT sector in Nepal and it is very difficult to apply all of these together. Therefore, we need an umbrella legislation to regulate cybercrime.

(b) *Education and Training to the Nepal Police, Public Prosecutor, Judges and Private Lawyers*

The institutions which are in place to apply the law are not well trained in this field. Out of 12 cases discussed above only two have been decided by the Kathmandu district court so far and in both cases the accused was acquitted. It seems that the reasons are that the investigating agency, the Nepal Police, the public prosecutor as well as the judges are not familiar with the cyberlaw and its application. Cybercrime is related with the technology and unless one is familiar with technology, it is very difficult to understand the cause and effect. Thus on the one hand, law is not sufficient and it has not incorporated the issues which are existing in the field of cyberlaw and on the other hand, the implementing agencies are not well trained and well equipped with modern technology making the entire area uncertain.

(c) *Freedom of Expression in Cyberspace*

Freedom of expression is a fundamental right. It cannot be curtailed and it is a non-derogable rights. Government cannot put censure on the right to use the online medium to express ones opinion or views. The present age is the age of information and technology. One must exercise extreme care and diligence while using online medium for exercising his views and opinion.

The law should ensure that government must not restrict the freedom of expression in the name of maintaining law and order. There are number of possibilities where government can intercept the voice or private matters or can enter in the personal matters which may violate right of privacy. The government needs to be sensitive on this issue.

(d) *Creation of The Coordination Body*

The Nepal Telecom is the government-controlled telecommunication company. It is an autonomous organization. The coordination between Nepal police, public prosecutors, and officials of Nepal Telecom needs to be clarified. At the same time, these bodies should coordinate with each other so that they will be aware about the new development in ICT. The above justifies creation of a coordination body.

A Computer Emergency Response team should be formed to look after the incidents of cybercrime. It will coordinate with foreign Internet service providers. The main reason of failure in investigation of cybercrime is the lack of coordination mechanism.

(e) *Establishment of ICT Academy*

The public prosecutor and judges should be trained and they should be given the opportunities to study the information and technology laws. There must be separate

ICT academy for judges, Nepal Police, public prosecutor, which will provide comprehensive training.

(f) *Development of the Institutional Infrastructure of Nepal Police*

The Nepal Police has drawn the attention of the government frequently to the crippling effect of lack of technology on curbing crimes. The capacity of Nepal Police to fight crimes needs to be bolstered before criminal gain upper hand. At present, Nepal police is suffering in the absence of Cyber Forensic lab. It lacks different softwares, faster Internet service, web detecting tools, and so on. CIB is currently using software named I-2 in order to analyze the data which is not that as good as compared to other advanced software already in use elsewhere. They cannot afford them because of their high price. Forensic evidences are critical for successful investigation which leads to prosecution of criminals. The use of forensic techniques can significantly reduce the pressure of investigating officers and can enhance the success of investigations and prosecution. In the case of cybercrimes and financial crimes, the police need to download heavy files but the existing Internet service providers have not been able to fulfill their requirement.

(g) *Extending the Jurisdiction to Other District Courts*

Only the Kathmandu district court has been given the jurisdiction to register the charge sheet and proceed the trial. This jurisdiction should also be given to other district courts of Nepal. Only Kathmandu cannot represent the whole country. Sometimes due to the distance and administrative problems, the victim does not go to the police to inform the incidents.

(h) *Allocation of Sufficient Budget*

Nepal police needs availability of the equipments such as DNA profiling equipment, psychoanalysis equipment like polygraph, lie detector and voice detecting, and recording equipment for reporting and recording crimes. With limited budget allocation they cannot buy the modern technology and suffering from different technical problems.

(i) *Mutual Legal Assistance with the Developed Countries*

It is the most important factor for a developing country like Nepal that it gets support of the countries which have been dominating the ICT sector. India is the country which is taking lead in IT sector and thus can be potential partner in curbing cybercrimes in Nepal.

Chapter 30

High-Tech and Computer Crimes: Global Challenges, Global Responses

Subhash Chandra Singh

1 Introduction

Information technology today touches every aspect of life, irrespective of location on the globe. Everyone's daily activities are affected in form, content and time by the computer. Businesses, governments, and individuals all receive the benefits of this information revolution. The past several decades have brought a vast increase in the availability of electronic resources. With this increased availability, has come a new form of criminal activity that takes advantage of electronic resources, namely computer crime and computer fraud. Currently, these new forms of crime are burgeoning and pose a new and lasting challenge to law enforcement agencies at all levels in how to prevent, investigate, and prosecute these crimes.

Information technology has opened the door to antisocial and criminal behaviour in ways that would never have previously been possible. Computer systems offer some new and highly sophisticated opportunities for law-breaking, and create the potential to commit traditional types of crimes in non-traditional ways. The rapid transnational expansion of large-scale computer networks and the ability to access many systems through regular telephone lines increase the vulnerability of these systems and the opportunity for misuse or criminal activity. The computer crime may have serious economic consequences as well as serious consequences in terms of human security.

The new dimension of computer crime involves increased methods at criminals' disposal to commit certain crimes along with increased locations in which crimes can occur. For example, property crimes no longer have to involve face-to-face contact between the criminal and the victim. In the past, property crimes usually involved a criminal breaking into a victim's house or grabbing a purse from a person on the street. Today, criminals can commit property crimes from the comfort of their own

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homes against people who live on the other side of the world through the use of computers. Advancements in modern technology have helped countries develop and expand their communication networks, enabling faster and easier networking and information exchange. Most people around the world now depend on consistent access and accuracy of these communication channels. This chapter presents a summary of the computer crime and the challenges it poses to the law enforcement agencies. As computers have developed, so have also many criminal offences associated with their use. The author attempts here to evaluate the international and national strategies to combat computer-related crimes in this digital age.

2 Definition, Nature, and Types of Computer Crime

The definition of any subject matter is an indispensable step towards any proper legal treatment of that subject. However, the problem of properly identifying and defining a crime presents itself each time a new field of law emerges.¹ When academics first began to discuss the question of computer misuses, they soon found themselves face to face with this problem. As the United Nations Manual on the Prevention and Control of Computer Crime has prescribed, ‘(t)here has been a great deal of debate among experts on just what constitutes a computer crime or a computer-related crime. Even after several years, there is no internationally recognized definition of those terms’.²

Abuses, misuses, or crimes attached to computers take different and various forms. They are, however, classified in several ways and according to more than one criterion. One such classification makes use of two categories: (1) crimes where a computer system itself is the target such as hacking, dissemination of viruses, and denial of service attacks; (2) traditional crimes like fraud, theft, and child pornography that are facilitated and enabled by a computer.³ The second classification system categorizes computer crimes into four types: (1) theft of money, financial instruments, property, services, or valuable data; (2) unauthorized access to computer time; (3) illegal use of computer programs; and (4) unauthorized acquisition of stored data.⁴

¹Amalia M. Wagner, “The Challenge of Computer-Crime Legislation: How Should New York Respond”, 33 *Buffalo Law Review*, 1984, at 782.

²The United Nations Commission on Crime Prevention and Criminal Justice, International Review of Criminal Policy- United Nations Manual on the Prevention and Control of Computer Crime, 8th Congress, Vienna, April 27-May 6, 1999.

³Brian C. Lewis, “Prevention of Computer Crime Amidst International Anarchy”, *American Criminal Law Review*, 2004, at 1355; In general, computer crimes are crimes where a computer system itself is the target, while computer enabled crime is a traditional crime like fraud or theft that is facilitated by a computer.

⁴Elizabeth A. Glynn, “Computer Abuse: The Emerging Crime and the Need for Legislation”, 12 *Fordham Urban Law Journal*, 1984, pp. 74–75.

According to one commentator, there are four basic types of computer-related crimes: (1) theft of computer time and services; (2) theft of computer software or data; (3) theft of computer hardware, including components that may constitute trade secrets; and (4) theft of property by the use of a computer.⁵ Another classification system adopted by the United States Department of Justice seems to be particularly reliable and effective. This system separates computer crimes into three categories according to the computer's role in a particular crime; first, the computer may be the 'object' of a crime. This happens when the criminal launches an attack upon an individual computer or a network: 'such attacks may include unauthorized access to information stored on the computer or the targeted network; the unauthorized corruption of that information; or theft of an electronic identity'.⁶ Second, the computer may be the 'subject' of a crime; this happens when the computer is 'the physical site of the crime, or the source of, or reason for, unique forms of asset loss'.⁷ Hacking and dissemination of viruses, worms, logic bombs and Trojan horses are some of the more common threats posed when a computer is the subject of an attack.⁸ Finally, a computer could be the instrument for perpetrating traditional offences. For example, a computer can be used to steal credit card information, store and distribute obscenity,⁹ or distribute child pornography and other types of obscene materials through computers linked to the Internet.¹⁰ The computer can even be used as an instrument to commit traditional violent crimes such as homicide. In New Zealand, for example, two programmers were convicted in 1980 of involuntary manslaughter when they caused an airline crash that resulted in 257 deaths through criminal negligence in programming flight navigation.¹¹

3 The Potential Impacts of High-Tech and Computer Crimes

Recent and anticipated changes in technology arising from the convergence of communications and computing are truly breathtaking, and have already had a significant impact on many aspects of life. Banking, stock exchanges, air traffic control, telephones, electric power, and a wide range of institutions of health,

⁵Gary J. Valeriano, "Pitfalls in Insurance Coverage for Computer Crimes", 59 *Defense Counsel Journal*, 1992, at 512.

⁶Michael Edmund O'Neill, "Old Crimes in New Bottles: Sanctioning Cybercrime", 9 *George Mason Law Review*, 2000, at 243.

⁷Laura J. Nicholson, "Comment, Computer Crimes", 37 *American Criminal Law Review*, 2000, at 211.

⁸Michael Edmund, *supra* note 6, pp. 246–249.

⁹*Id.*, at 242.

¹⁰*Id.*, at 249.

¹¹Carol C. McCall, "Computer Crime Statutes: Are They Bringing the Gap between Law and Technology", 11 *Criminal Justice Journal*, 1988–1989, at 204.

welfare, and education are largely dependent on information technology and telecommunications for their operation. We are moving rapidly to the point where it is possible to assert that ‘everything depends on software’.¹² The exponential growth of this technology, the increase in its capacity and accessibility, and the decrease in its cost have brought about revolutionary changes in commerce, communications, entertainment, and education. Along with this greater capacity, however, comes greater vulnerability. Information technology has begun to provide criminal opportunities of which law enforcement agencies would never have dreamed.

As businesses and societies in general increasingly rely on computers and Internet-based networking, cybercrime, and digital attack incidents have increased around the world. These attacks generally classified as any crime that involves the use of a computer network include financial scams, computer hacking, downloading pornographic images from the Internet, virus attacks, e-mail stalking and creating websites that promote racial hatred. The first major instance of cybercrime was reported in 2000, when a mass-mailed computer virus affected nearly 45 million computer users worldwide.¹³

In the UK, the annual cost resulting from cybercrime is estimated at GBP27 billion (US\$43 billion). A major portion of that is the result of intellectual property (IP) theft, which is expected to account for an annual total of GBP 9.2 billion (US \$14 billion), while espionage activities are expected to cost more than GBP 7 billion (US\$11 billion).¹⁴

Due to the nature of cybercrime, estimating its extent is challenging. Some cybercrimes are never detected by their victims or are either concealed from or not reported to authorities because disclosure could prove embarrassing or commercially inconvenient to victims. Available data about cybercrime paints a picture of how organized criminals are finding new tools for moving their illicit activities between the real-world and virtual environments. Electronic crime varies in its manifestations, so it is difficult to discuss in terms of aggregate incidence and impact. As a result, definitive information on the present extent and impact of electronic crime in India and overseas is not available. A significant amount of this crime is simply not reported. This is in part because of a great reluctance to notify incidents to law enforcement authorities to avoid any potentially adverse impact on consumer confidence, or perhaps because of a lack of confidence in the capacity of law enforcement to deal with such issues in a timely manner.

The social costs of crimes like child exploitation and cyber stalking for victims and their families would also be significant. The repercussions may include medical problems such as depression or other mental health issues, unemployment, truancy, family break down and deterioration in quality of life and well-being of the general community. On the other hand, the social costs would be significant if India was

¹²O. Edward, “Hackers from Hell”, *Forbes*, 9 October 1995, at 182.

¹³Message Labs Intelligence: 2010 Annual Security Report, Symantec.

¹⁴*The Cost of Cybercrime*, Detica, February 2011.

unable to capitalize on the enormous benefits flowing from the growth of electronic commerce.

Alternatively, and particularly in terms of money laundering, they can cultivate ‘cyber mules’ ordinary people who are recruited as ‘international sales representatives’ or ‘shipping managers’ and are then asked by criminals to receive payments into a bank account. The ‘cyber mule’ then sends the money out again, effectively laundering it and in return, receives a commission. Cybercrime has a wide ranging impact including:

1. Loss of online business where consumers lose confidence in the digital economy;
2. Potential for critical infrastructure to be compromised affecting water supply, health services, national communications, energy distribution, financial services and transport;
3. Victims who lose financial resources and subsequently suffer losses in terms of time and effort, and the emotional damage attached to the crime;
4. Businesses that lose assets;
5. Costs to government agencies and businesses who must help re-establish credit histories, accounts and identities;
6. Cost to businesses in improved cyber security measures;
7. Fuelling other criminal activity; and
8. Increasing investment in time and resources by law enforcement.

4 High-Tech and Computer Crime: A Global Challenge

Before we explore some of the challenges that new high-tech and computer-related crimes pose, it is important to describe the three ways the criminals use computers.¹⁵ First, a criminal may target or attack a computer or a system controlled by a computer (e.g. hackers disrupting local phone service). Second, a criminal may use a computer to commit a ‘traditional’ crime such as fraud or theft (e.g. promoting bogus investments on a Web page). Third, a criminal may use a computer in a way that is incidental to the offence, but where the computer nonetheless contains evidence of a crime (e.g. drug dealers using personal computers to store records of drug sales and ‘clients’).¹⁶ The first two kinds of criminal activity can be carried out remotely, and often from great distances. Likewise, evidence of a crime can be stored at a remote location, either for the purpose of concealing the crime from law enforcement and others, or simply because of the design of the network.

¹⁵Scott Charney and Kent Alexander, “Computer Crime”, 45 *Emory Law Journal*, 1996, at 934, stressing the need for an organized international response to the worldwide problem of computer crime.

¹⁶Ibid.

This element of remoteness takes the investigation and prosecution of these crimes out of the exclusive purview of any single nation, thereby creating challenges and obstacles to crime-solving. The power of networks and Pentium-driven PCs makes every computer a potential tool for criminals and gives them the ability to reach across borders with great stealth and then hang up the phone to disappear without a trace. The globalization of criminal activity and the anonymity with which criminals can cross electronic ‘borders’ is a real problem, with a potential to affect every country, every law enforcement officer, every citizen.

The challenge is to study, analyse, and compare the policies and practices of combating computer crime under different jurisdictions in order to identify the extent to which they are consistent with each other and with international guidelines; and the extent of their successes and limitations. The information age is confronting and challenging police, practitioners and other law enforcers who are required to investigate offences where IT devices or networks are the tool or the target of crime, or the repository of evidence about crime. Vital to the law enforcement response to electronic crime is the leadership of the private sector, which has a critical role in ensuring a safe and secure online environment. In particular, the private sector should take the lead in areas such as the design of new technologies to protect children online, self-regulatory consumer protection initiatives, and coordination and cooperation with law enforcement. There is scope to increase the current role of the private sector for the benefit of all parties.

Computer and telecommunications security is a matter of concern for many organizations. Both public and private sectors must be encouraged to identify areas of vulnerability and to implement security measures to protect against threats to confidentiality and integrity, and safeguard availability of systems and data. Exposure to breaches of security must be reduced to an acceptable level by instituting threat prevention, threat detection, and an appropriate response to security violations.

In 2008, small, medium and large Australian businesses were surveyed on unauthorized use, damage, monitoring, and attack or theft of their business information technology. Of those surveyed, 14% reported computer security incidents during the survey year amounting to a financial loss estimated up to \$649 million. Only 8% of victims reported breaches to the authorities yet estimated the cost of e-protection for their business to be up to \$1.95 billion.¹⁷ The most common incidents of cybercrime cited in the Australian survey are malware code and virus attack leading to software corruption.¹⁸ Between 2007 and 2008, malware detections rose tenfold with a majority said to be geared towards stealing identity information, password information or credit card information in such a way as to make money. Using the Internet allows cyber criminals to use less hierarchical

¹⁷G. Challice, *The Australian Business Assessment of Computer User Security Survey: Methodology Report*, Australian Institute of Criminology, Technical and Background Paper No. 32, 2009.

¹⁸Ibid.

structures than traditional organized crime groups. It allows new collaborations so that loose affiliations can form even though members may live thousands of kilometres apart and never meet in person. This helps to make the organization of cybercrime more efficient, effective, fast and flexible. Organized crime groups need not have the expertise and access to commit cybercrime, because they can buy it. They can shop around for capable and competitively priced people to help them. They can even use the Internet to buy or rent the malware or software they need to commit their crimes, download manuals or do-it-yourself virus kits, or visit bulletin boards.

Transnational crime of a more conventional nature has proved to be a very difficult challenge for law enforcement. Computer-related crime poses even greater challenges. There may be differences between jurisdictions about whether or not the activity in question has occurred at all, whether it is criminal, who has committed it, who should investigate it and who should adjudicate and punish it. Moreover, there is a fundamental tension between the deregulatory imperative which characterizes the world's advanced economies and the desire to control some of the darker corners of cyberspace. There is a significant danger that premature regulatory interventions may not only fail to achieve their desired effect, but may also have a negative impact on the development of technology for the benefit of all. Over-regulation or premature regulatory intervention may run the risk of chilling investment and innovation. Given the increasingly competitive nature of the global marketplace, governments may be forced to choose between paternalistic imperatives and those of commercial development and economic growth.

5 Trans-Border Criminality and Extra-Territorial Issues

One of the more significant aspects of computer-related crime is its global reach. While international offending is by no means a uniquely modern phenomenon, the global nature of cyberspace significantly enhances the ability of offenders to commit crimes in one country which will affect individuals in a number of other countries. This poses great challenges for the detection, investigation, and prosecution of offenders. Two problems arise in relation to the prosecution of computer-related and cyber offences which have an inter-jurisdictional aspect: first, the determination of where the offence occurred in order to decide which law to apply and, second, obtaining evidence and ensuring that the offender can be located and tried before a court. Both these questions raise complex legal problems of jurisdiction and extradition.¹⁹ If an online financial newsletter originating in Germany contains fraudulent speculation about the prospects of a company whose shares are traded on the Indian Stock Exchange, where has the offence occurred?

¹⁹D. Lanham, M. Weinberg, K.E. Brown and G. Ryan, *Criminal Fraud* (Law Book Co. Ltd., Sydney, 1987).

In the international context, the issue of jurisdiction is central, as demonstrated by the consideration of the issue in Australia by the Model Criminal Code Officers Committee (MCCOC) in 2000. Innovative ways of dealing with this complex issue may well be required. The impact of telecommunications and computers on societies is so fast and enormous, that code of ethics, common sense of justice and penal laws have not kept pace with those developments. In order to establish ethical behaviours in cyberspace, penal laws must be enacted with as much clarity and specificity as possible, and not rely on vague interpretations in the existing legislation. Perpetrators of the computer-related crimes cannot be convicted for their explicit acts by existing provisions stretched in the interpretation, or by provisions enacted for other purposes covering only incidental or peripheral conduct.

Law enforcement and criminal justice matters fall within the exclusive domain of the sovereign state, with the result that, traditionally, criminal jurisdiction has been linked to geographical territory. States must therefore refrain from bringing pressure to bear on other states regarding the behaviour of specific national bodies, such as law enforcement agencies or the judiciary.²⁰ Persons may not be arrested, summons may not be served, and police or tax investigations may not be mounted on the territory of another state, except under the terms of a treaty or other consent given.²¹ Of course, not all crimes occur neatly within the territorial jurisdiction. Where this is the case, international law has come to recognize a number of bases of extra-territorial jurisdiction in criminal matters.

As noted above, traditionally, the jurisdiction of courts is local. That is, courts can only entertain prosecutions in respect of offences committed against local laws where there existed a sufficient link between the offence and the jurisdiction in question. There is, however, always the possibility that legislatures will confer extra-territorial jurisdiction for some crimes. Some common examples include offences committed on the high seas, counterfeiting offences, crimes committed by nationals outside the country, crimes committed by the members of the defence forces, and, recently in Australia and elsewhere, sexual relations between Australians and children overseas who are under 16 years of age.²²

Thus, the criminal activities committed from across the globe pose greater problems. Sovereign governments are finding it difficult to exercise control over online behaviour at home, not to mention abroad. A resident of Chicago who falls victim to a telemarketing scam originating in Albania, for example, can expect little assistance from law enforcement agencies in either jurisdiction. As a result,

²⁰Even, for example, where nationals of one state are on trial overseas, the basic underlying principle is that the state cannot interfere in the judicial procedures of the other sovereign state on behalf of its national. Similarly, states cannot take measures on the territory of another state by way of enforcement of their own national laws without the consent of the latter. Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2001) at 53.

²¹I. Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 2003) at 306.

²²Crimes Legislation Amendment (Sexual Offences against Children) Act, 2010, section 272.

regulation by territorially based rules may prove to be inappropriate for these types of offences.²³ Extra-territorial law enforcement costs are also often prohibitive. Moreover, the cooperation across international boundaries in furtherance of such enforcement usually requires a congruence of values and priorities which, despite prevailing trends towards globalization, exists only infrequently.

Countries must be able to prosecute cybercrimes committed by national individuals or any person domiciled in that country, whenever the acts are committed abroad. And each country should also be able to prosecute a foreigner present in the country, whenever it does not extradite the person after a request for extradition for cybercrimes committed abroad.

6 Problems with Evidence and Proof

Computers have brought us some special problems with respect to evidence. For example, the rules of evidence tell us that anything the witness does not experience directly is ‘hearsay’. With computers, we can make a case that anything coming out of the computer that we do not directly see could be hearsay. The fact that logs can be altered, file dates changed, documents erased or changed leads us to believe that only the person who creates the information, using the computer, has direct knowledge of it. However, we can use computer records as evidence if we are very careful, and meet some specific criteria. For computer evidence to be admissible, it must first be probative. That means it must be beneficial in proving our case (or, perhaps, disproving it). If it is unrelated to the incident or in showing that the suspect committed the incident, the court would not allow its use.

Computer evidence must be authentic. It must be shown by experts to be pristine and unaltered from their original state. This is of critical importance when we discuss forensic evidence. How the evidence was collected, handled, preserved, transferred, and protected from alteration will be key elements in accepting or discrediting the evidence. Usually, the pristine state of evidence must be established by the testimony of experts and of those individuals who collected, preserved, and handled it. Finally, computer evidence must meet the best evidence rule. That means, while it need not be the original, it must be the best copy available. If the original is available, a copy will not do. Sometimes, a copy, taken under controlled circumstances and treated and handled properly, will meet the best evidence rule, even if the original is available. This can happen when we print a log from a file that has been properly collected, preserved, and handled if the printout is also properly handled and the original file can be made available for comparison. An expert would usually have to testify as to how the printout was made and to the other details of handling the file and the printout.

²³D.G. Post, “Anarchy, State and the Internet: An Essay on Law Making in Cyber Space”, *Journal of Online Law*, 1995, at 3.

The handling of computer evidence requires a special discussion. Evidence is preserved in what is called a chain of custody. That means it is possible to establish positively the possession of an item of evidence from the time it was collected until the time it is used in court. Such things as dated signatures on evidence envelopes, protection in locked safes or file cabinets, and preservation from access by unauthorized individuals will help to preserve chain of custody. In general, test programs, forensic tools, auditing programs, and other detection utilities should be commercial products which can be shown to be reliable examples of tools intended to perform their evidentiary tasks.

Evidence is a sword that can cut two (or more) ways. There is evidence that we may not be able to use. Generally, that is evidence covered by the exclusionary rule. That rule covers evidence that was improperly or illegally collected. This is usually more of a problem for law enforcement because they function under the strict rules of search and seizure. Evidence can be protected by the accused using protective orders. These orders are granted if the court is satisfied, for example, that the evidence contains information that is a trade secret that could considerably cost one party if revealed. It could be granted if the court believes serious harm to its possessor could result in its revelation. In fact, anything that satisfies the court that more harm than good will be done by revealing the evidence will usually get it suppressed. Evidence includes the act of establishing that something illegal actually occurred. This could mean showing that the perpetrator actually broke into a system. To do that the victim wants to establish proprietary rights to the system, files, or other software accessed or damaged.

The hacker may contend that there are no proprietary rights to the system or anything on it. In addition, computers themselves leave tracks. It takes a very knowledgeable computer expert to know where every track is being left. From forensic perspective, it is said that there are many hidden areas of a computer disk that even most so-called experts do not know about. The reason is actually pretty simple: Many computer ‘experts’ usually are little more than very accomplished programmers. An understanding of underlying operating system functions, the hardware, the hardware/software/firmware/operating system interface, and the communications functions inside and outside the computer offer a wealth of investigative opportunities, and, possibly, traps for even the most accomplished hacker. Thus, computer crime poses critical challenges for our law enforcement agencies to collect evidence and to establish it in the court of law successfully.

7 International and Regional Initiatives

Given the serious nature of computer crime, and its global nature and implications, it is clear that there is a crucial need for a common understanding of such criminal activity internationally in order to deal with it effectively. Research into the extent to which legislation, international initiatives, and policy and procedures to combat and investigate computer crime are consistent globally is therefore of enormous

importance. It is said that because of the transnational nature of computer crime there is a need internationally for further harmonization of approaches for combating computer crime. In order to reach a global harmonization of cybercrime legislation, and a common understanding of cyber security and cybercrime among countries at all stages of economic development, a global agreement or Protocol at the United Nations level should be established that includes solutions aimed at addressing the global challenges. A convention or a treaty is normally a more binding agreement, where parties to the treaty may be held liable under international law for breaches of the agreement. The most active UN-institution in reaching harmonization on global cyber security and cybercrime legislation is the International Telecommunication Union (ITU). ITU in Geneva is uniquely positioned for developing a global agreement or protocol on cyber security and cybercrime. It may be then called the Geneva Protocol.

To date, three multilateral organizations (i.e. groups with multiple-nation membership) are doing the bulk of the international policy work on high-tech and computer-related crime: the Council of Europe (COE), the European Union (EU) and its related institutions, and the G8. To a lesser degree, some works in this area have been done by the Organization for Economic Cooperation and Development (OECD), and the United Nations.

7.1 *United Nations*

The United Nations adopted a resolution²⁴ on computer crime legislation at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba, in 1990. The United Nations Manual on the Prevention and Control of Computer-related Crime was published in 1994. The United Nations General Assembly has adopted a number of resolutions. General Assembly Resolutions 55/63 of 4 December 2000 and 56/121 of 19 December 2001 on ‘Combating the Criminal Misuse of Information Technologies’ are most important. The Resolution 55/63 includes the following: (a) States should ensure that their laws and practice eliminate safe havens for those who criminally misuse information technologies; (b) Legal systems should protect the confidentiality, integrity, and availability of data and computer systems from unauthorized impairment and ensure that criminal abuse is penalized. The Resolution 56/121 invites Member States, when developing national laws, policy and practices, to combat the criminal misuse of information technologies, to take into account, *inter alia*, the work and achievements of the Commission on Crime Prevention and Criminal Justice.

As noted above, the most active UN institution in reaching harmonization on global cyber security and cybercrime legislation is the International Telecommunication Union (ITU) in Geneva. The Secretary General of the ITU

²⁴The resolution was adopted by the General Assembly on December 14, 1990.

launched in May 2007 the Global Cyber security Agenda (GCA) for a framework where the international response to the growing challenges to cyber security could be coordinated. GCA is the framework for proposing strategies for solutions to enhance confidence and security in the information society, under the umbrella of cyber security.

7.2 *The Council of Europe*

The first initiative on computer crime in Europe was the Council of Europe Conference on Criminological Aspects of Economic Crime in Strasbourg in 1976.²⁵ Categories of computer crime were introduced, including fraud. The Council of Europe appointed in 1985 another expert Committee in order to discuss the legal issues of computer-related crime. The Council of Europe adopted on 11 September 1995 another Recommendation concerning problems of procedural law connected with information technology. This Recommendation introduces 18 principles categorized in several chapters: search and seizure; technical surveillance; obligation to co-operate with the investigating authorities; electronic evidence; use of encryption; research; statistics and training; and international cooperation.²⁶

The Council of Europe Convention on Cybercrime is a historic milestone in the combat against cybercrime.²⁷ On 7 November 2002, the Committee of Ministers adopted the Additional Protocol to the Convention on Cybercrime.²⁸ The Additional Protocol requires ratifying Member States to pass laws criminalizing ‘acts of racist or xenophobic nature committed through computer networks’. This includes the dissemination of racist or xenophobic material, the making of racist or xenophobic threats or insults, and the threat of the Holocaust and other genocides. It also commits ratifying nations to extend to these crimes the investigative capabilities and procedures created pursuant to the main Convention. The Additional Protocol opened for signature on 28 January 2003. It came into force on 1 March 2006, after 5 states had ratified it.²⁹ As of 5 June

²⁵A Paper for the 12th Conference of Directors of Criminological Research Institutes on “Criminological Aspects of Economic Crime”, Strasbourg, 15–18 November, 1976, pp. 225–229.

²⁶The Council of Europe Recommendation No. R (95) 13 Concerning Problems of Criminal Procedural Law connected with Information Technology, adopted by the Committee of Ministers on 11 September, 1995.

²⁷The Convention on Cybercrime, the Council of Europe, Budapest, 23/11/2001, which entered into force on July 1, 2004.

²⁸The Additional Protocol is available at: <http://conventions.coe.int/Treaty/EN/Treaties/html/189.htm> [accessed on February 18, 2013]. The Explanatory Report accompanying the Additional Protocol is available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/189.htm>. [accessed on February 18, 2013].

²⁹The Council of Europe Convention on Cybercrime, available at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=189&CM=8&DF=05/06/2010&CL=ENG>. [accessed on February 18, 2013].

2010, 17 states have ratified the Additional Protocol.³⁰ Another 17 nations have signed but not ratified it.³¹ The United States participated in the drafting of the protocol but did not sign it because of concerns that it was inconsistent with guarantees of the United States Constitution.³² Ratification of the main Convention does not oblige a ratifying state to take any action under the Additional Protocol.

An Additional Protocol on the Criminalization of Acts of a Racist and Xenophobic Nature Committed through Computer Systems of January 2003 has also been adopted. The Convention contains four chapters. Chapter 1 includes use of terms (computer system, computer data, service provider and traffic data). Chapter 2 includes measures to be taken at the national level and covers substantive criminal law, procedural law, and jurisdiction. Substantive criminal law contains offences against the confidentiality, integrity and availability of computer data and systems, computer-related offences such as computer-related forgery and fraud, offences related to child pornography, and offences related to infringements of copyright and related rights. Provisions of procedural law shall apply to any criminal offence committed by means of a computer system, and to the collection of evidence in electronic form of a criminal offence. The provisions contain expedited preservation of stored computer data, production order, search and seizure of stored computer data, real-time collection of computer data. Chapter 3 on international cooperation includes principles relating to extradition, general principles relating to mutual assistance, procedures pertaining to mutual assistance requests in the absence of applicable international agreements, mutual assistance regarding provisional measures, mutual assistance regarding investigative powers. Chapter 4 on final provisions contains the final clauses, mainly in accordance with standard provisions in the Council of Europe treaties.

The Convention represents the most substantive, and broadly subscribed, multilateral agreement on cybercrime in existence today. It offers a relatively comprehensive approach to harmonizing national legislation to address cybercrime both substantively and procedurally, and presents a framework for international cooperation that did not exist before except on a bilateral or ad hoc basis. One

³⁰The following Member states have ratified the Additional Protocol: Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Denmark, France, Latvia, Lithuania, Montenegro, Norway, Portugal, Romania, Serbia, Slovenia, The Former Yugoslav Republic of Macedonia, and Ukraine. See, *Ibid*.

³¹The 17 nations that have signed but not ratified the Additional Protocol are: Austria, Belgium, Estonia, Finland, Germany, Greece, Iceland, Liechtenstein, Luxembourg, Malta, Moldova, Netherlands, Poland, Sweden, and Switzerland, and participating non-Member states Canada and South Africa. Seventeen participating states have not signed the Additional Protocol: Member states Andorra, Azerbaijan, Bulgaria, Czech Republic, Georgia, Hungary, Ireland, Italy, Monaco, Russia, San Marino, Slovakia, Spain, Turkey, and United Kingdom, and participating non-Member states Japan and the United States of America. See, *Ibid*.

³²U.S. Department of Justice, Computer Crime and Intellectual Property Section, Council of Europe Convention on Cybercrime, Frequently Asked Questions and Answers, available at: <http://www.justice.gov/criminal/cybercrime/COEFAQs.htm>. [accessed on February 22, 2013].

critical, but often overlooked, aspect of the Convention is that many of its procedural provisions are not limited to cybercrimes. Rather, they extend to *any* crimes for which it is necessary to collect evidence ‘in electronic form’.³³ Thus, the Convention obliges ratifying states to create laws allowing law enforcement to search and seize computers and ‘computer data’, engage in wiretapping, and to obtain real-time and stored communications data, whether or not the crime under investigation is a cybercrime.³⁴ Thus in many ways the ‘Convention on Cybercrime’ is a misnomer or is at least a misleadingly narrow description of the Convention’s substance.

7.3 The G8 Group of States

At a meeting in Washington D.C. in 1997, the G8³⁵ countries adopted ten principles to combat against computer crime:

1. There must be no safe havens for those who abuse information technologies;
2. Investigation and prosecution of international high-tech crimes must be co-ordinated among all concerned States, regardless of where harm has occurred;
3. Law enforcement personnel must be trained and equipped to address high-tech crimes;
4. Legal systems must protect the confidentiality, integrity, and availability of data and systems from unauthorized impairment and ensure that serious abuse is penalized;
5. Legal systems should permit the preservation of and quick access to electronic data, which are often critical to the successful investigation of crime;
6. Mutual assistance regimes must ensure the timely gathering and exchange of evidence in cases involving international high-tech crime;
7. Trans-border electronic access by law enforcement to publicly available (open source) information does not require authorization from the State where the data resides;
8. Forensic standards for retrieving and authenticating electronic data for use in criminal investigations and prosecutions must be developed and employed;

³³Supra note 27, Article 14(2)(c), See also Convention on Cybercrime, Explanatory Note 141 (“The Convention makes it explicit that Parties should incorporate into their laws the possibility that information contained in digital or other electronic form can be used as evidence before a court in criminal proceedings, irrespective of the nature of the criminal offence that is prosecuted”).

³⁴*Id.*, Article 18–21.

³⁵The Group of 8 (G-8) was formed at an economic summit in France in 1975 and comprises of the eight leading industrialized countries including the United Kingdom, Canada, France, Germany, Italy, Japan, Russia, and the United States.

9. To the extent practicable, information and telecommunications systems should be designed to help prevent and detect network abuse, and should also facilitate the tracing of criminals and the collection of evidence; and
10. Work in this area should be coordinated with the work of other relevant international fora to ensure non-duplication of efforts.³⁶

At the Meeting of G8 Justice and Home Affairs Ministers in Washington D.C., on 10–11 May 2004, a joint communiqué stated that with the Council of Europe Convention of Cybercrime coming into force the States should take steps to encourage the adoption of the legal standards it contains on a broad basis. In a statement from the G8 Meeting in 2005 a goal was emphasized: To ensure that law enforcement agencies can quickly respond to serious cyber-threats and incidents. At the Moscow Meeting in 2006, the G8 Justice and Home Affairs Ministers discussed cybercrime and issues of cyberspace. In a statement it was emphasized:

We also discussed issues related to sharing accumulated international experience in combating terrorism, as well as comparative analysis of relevant pieces of legislation on that score. We discussed the necessity of improving effective countermeasures that will prevent IT terrorism and terrorist acts in this sphere of high technologies. For that it is necessary to device a set of measures to prevent such possible criminal acts, including in the sphere of telecommunication. That includes work against the selling of private data, counterfeit information and application of viruses and other harmful computer programs. We will instruct our experts to generate unified approaches to fighting cyber criminality, and we will need an international legal base for this particular work, and we will apply all of that to prevent terrorists from using computer and Internet sites for hiring new terrorists and the recruitment of other illegal actors.³⁷

At the end of a 3 day conference on computer crime in Paris,³⁸ the G8 nations the United States, the United Kingdom, France, Germany, Canada, Russia, Japan, and Italy agreed on the importance of cooperation, particularly in tracing computer criminals across international borders. The world's leading industrialized nations commit to unprecedented levels of international cooperation in order to combat the perceived threat of international computer crime. The member states were of the view that 'the ability to locate and identify Internet criminals through different systems is critical to deterring, investigating and prosecuting crime that has an

³⁶Meeting of the Justice and Interior Ministers of The Eight, Communiqué Annex, Washington, D.C. (1997), available at: <http://www.cybercrime.gov/principles.htm> [accessed on February 28, 2013].

³⁷Stein Schjolberg, "The History of Global Harmonisation on Cybercrime Legislation—The Road to Geneva", 2008), available at: http://www.cybercrimelaw.net/documents/cybercrime_history.pdf [accessed on August 20, 2013].

³⁸A 3-day Cybercrime Conference was held in Paris in May, 2000 which was attended by nearly 300 delegates including judges, police officials, diplomats, legal experts, leading businessman and industrialists from G-8 countries. The conference stressed on the desirability of a global law to tackle the hackers, software pirates, crooks and virus attackers who were making the life of internet users miserable. The members unanimously agreed that there was a need for an international convention to deliberate on cyber crime related issues and urgency of setting up an International Criminal Tribunal having global jurisdiction to deal with cyber crime and criminals.

electronic component'. The cross-border nature of computer networks makes it relatively easy for offenders to store information in other jurisdictions and to move or erase it quickly to elude seizure. The G8 wants to see all member countries adopt similar laws on cybercrime and to persuade other countries to adopt cooperative anti-cybercrime laws. They also want to improve cross-border communication and cooperation in order to speed up the extradition of suspected computer criminals and improve the gathering of forensic computer evidence.

7.4 The Commonwealth Cybercrime Initiatives

In an effort to harmonize computer related criminal law in the Commonwealth countries, experts gathered together and presented a model law to the conference of ministers in 2002. The model law, titled the Computer and Computer Related Crimes Act,³⁹ shares the same framework as the Convention on Cybercrime to limit conflicting guidance. The model law serves as an example of common principles each country can use to adapt framework legislation compatible with other Commonwealth countries. At their meeting in Sidney in July 2011, Commonwealth Law Ministers recognized the urgent need to update Cybercrime legislation in member countries and pledged to contribute to work in this area within the Commonwealth. Also in 2011, the Commonwealth Internet Governance Forum, which draws together stakeholders from across the Commonwealth who are actively engaged in the Internet Governance Forum and ICANN, launched the Commonwealth Cybercrime Initiative (CCI), under the leadership of the COMNET Foundation for ICT Development.⁴⁰

The Commonwealth Internet Governance Forum (CIGF) held consultation with stakeholders to gauge the support for a Commonwealth-led Initiative on Cybercrime with a view to seeking endorsement of this from Commonwealth Heads of Government in Australia in October 2011. The development of this initiative is in response to the increasing importance that is attached to cyber security in the face of the Internet's exponential growth. The CIGF is introducing this initiative at the various regional Internet Governance Forums (IGFs) in order to seek feedback from the member countries and regions. The Commonwealth Cybercrime Initiative was the focus of the CIGF open forum at the 6th IGF in Nairobi, Kenya. The objective of this initiative is to assist developing Commonwealth countries to build their institutional, human and technical capacities with respect to policy, legislation, regulation, investigation, and law enforcement with the aim of making their jurisdictions more secure by denying safe havens to cyber criminals, and enabling all

³⁹The Legal and Constitutional Affairs Division, Commonwealth Secretariat.

⁴⁰Commonwealth Cybercrime Initiative, Project Description, Commonwealth Governance Internet Forum (August 2012). Available at: <http://www.commonwealthigf.org/cigf/cybercrime/> [accessed on December 18, 2013].

member countries to become effective partners in the globally coordinated effort to combat Cybercrime. A high-level panel meeting on Global Internet Cooperation and Governance was held in December, 2013 in London to discuss global Internet cooperation and governance mechanisms. The Panel expressed strong support for a multi-stakeholder approach to the future of Internet governance. The conversations held at the London meeting were facilitated by a team of Internet governance experts.⁴¹

The Cybercrime Initiative aims to promote the sharing of expertise and best practice from existent resources, focusing upon the Commonwealth Model Law on Computer and Computer-Related Crime (Model Law), and also drawing from other existent treaties, toolkits, and resources, to enable countries to address the legislative gaps so that they can deal with incidents of cybercrime. By virtue of this Initiative and in collaboration with development partners, the Commonwealth is proposing to provide the leadership as follows:

1. Assistance in the implementation of a common law. Enable governments to put in place the necessary elements to support the preparation, adoption, and implementation of cybercrime legislation. This will include an assessment of existent legal frameworks and support in the development of the required policy, legislative/regulatory instruments, and the reforms necessary to enable enforcement.
2. Capacity building by means of virtual workshops, databases, networking and in-country training programmes, and provision of technical expertise targeted at policymakers, regulatory bodies, and judiciary.

7.5 European Union/EU Directives

In the area of high-tech crime, the EU has issued several Directives. In 1995, it promulgated a Directive which established certain rights for citizens concerning electronically processed data.⁴² For example, the Directive establishes the right of a citizen to know what electronic data a corporation maintains on that person, and provides protection against personal data being transferred to a non-EU country if that country has inadequate privacy protections.⁴³ Member states are required to

⁴¹High-Level Panel Meeting on Global Internet Cooperation and Governance Mechanisms, Commonwealth Internet Governance Forum, available at: <http://www.commonwealthigf.org> [accessed on December 18, 2013].

⁴²Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. 31 (L 281); Directive 97/66/EC of the European Parliament and of the Council of December 15, 1997 Concerning the Processing of Personal Data and the Protection of Privacy in the Telecommunications Sector, 1997 O.J. 1 (L 24) (January 30, 1998).

⁴³Ibid.

establish mechanisms to enforce these rights.⁴⁴ In 1997, the EU issued a Directive designed to ensure privacy relating to telecommunications data.⁴⁵ That directive requires telecommunications carriers to delete traffic data at the end of each transmission (with exceptions for billing purposes and for law enforcement and national security needs).⁴⁶ In light of these Directives, it is imperative that government policy decisions concerning electronic commerce and privacy be made in concert with decisions concerning public safety.

On 3 September 2013, new EU Directive 2013/40 on attacks against information systems (the ‘Directive’) came into force.⁴⁷ The Directive aims to tackle large-scale cyber-attacks by requiring Member States to strengthen national cybercrime laws and introduce tougher criminal sanctions. The Directive was initially proposed in 2010 as a replacement to the EU Council Framework Decision 2005/222/JHA (the ‘Framework Decision’), which criminalized various activities in relation to attacks on information systems. Since the Framework Decision, there have been a number of increasingly sophisticated and high-profile cyber-attacks and the EU Council considered that further regulation was needed. The Directive retains many of the provisions in the Framework Decision and sets out similar offences in relation to illegal access to information systems and interference with systems and data. However, the Directive introduces new rules that outlaw the use of botnets and malicious software, as well as illegally obtained passwords. The use of botnets, which are networks of computers infected with malicious software and controlled as a group without the owners’ knowledge, is cited by the EU Parliament in the preamble to the Directive as a particular concern.

The new penalties to be imposed by Member States are between 2 and 5 years imprisonment. The Directive provides that penalties should be more severe where an attack against an information system is committed by a criminal organization, or where such an attack causes significant damage or affects key infrastructure. In addition to new offences and tougher penalties, the new Directive aims to facilitate the prevention of cybercrime by improving cooperation between judicial and other competent authorities. Member States will be required to use the existing G8 and Council of Europe structure of 24/7 contact points, with an obligation to answer within eight hours any urgent requests for help. Member States will also need to collect statistics on cyber-attacks, which the European Commission will review to help prevent future attacks. Member States have until 4 September 2015 to implement the provisions of the Directive into national law. Businesses are likely to welcome a pan-European approach to penalties, and a more aggressive stance in tackling large-scale cyber-attacks.

⁴⁴Ibid.

⁴⁵Ibid.

⁴⁶Ibid. The EU has issued a number of other documents relating to crime in cyberspace. See, e.g., Decision No. 276/1999/EC of the European Parliament and of the Council of January 25, 1999, Official Journal of the European Communities, L33/1 (Feb. 6, 1999) (adopting an action plan on promoting safer use of the Internet by combating illegal and harmful content on global networks).

⁴⁷The EU Directive 2013/40 on Attacks against Information System.

7.6 *Interpol*

Interpol was the first international organization to address computer crime and penal legislation at a Conference in Paris in 1979.⁴⁸ In a presentation on computer frauds it emphasized as follows: The nature of computer crime is international, because of the steadily increasing communications by telephones, satellites etc., between the different countries. International organizations, like Interpol, should give this aspect more attention.⁴⁹

Interpol initiated a discussion, and a project⁵⁰ was approved by the General Assembly in 1980/81. A Questionnaire on computer crime was circulated to the Interpol member countries. It was followed by The First Interpol Training Seminar for Investigators of Computer Crime, in Paris, 7–11 December 1981.⁵¹ In conjunction with this Conference a summary of answers from Interpol member countries on computer crime and penal legislation identified several legislative areas with unsatisfactorily existing penal legislation, such as (a) modification and erasure of data, or otherwise affecting data processing with destructive intent, (b) appropriation or obtaining data belonging to another with intent to gain the perpetrator, (c) obtaining, without authority, computer services for one's own purpose, using a computer belonging to another, (d) modification of data with fraudulent intent, or with intent to be used in legal transactions, (e) disclosure of data without authority.

On the international level the trans-border data flow through telephones and radio systems, satellites and microwave facilities could create bilateral or multi-lateral problems if perpetrators are using such communications in criminal activities. The involvement of one country emphasized the need to harmonize penal codes through guidelines or recommendations to assure proper prosecution, which otherwise could be prevented by international jurisdictional problems.⁵²

⁴⁸The Third Interpol Symposium on International Fraud, Saint-Cloud, Paris, France, December 11–13, 1979.

⁴⁹Stein Schjolberg, then Assistant Commissioner of Police in Oslo, Norway.

⁵⁰Approved by Secretary General A. Bossard on April 30, 1980.

⁵¹The Conference was organized by Interpol in cooperation with Stein Schjolberg. It was attended by 66 delegates from 26 countries. The keynote speaker at the Conference was Donn B. Parker (SRI International, Menlo Park, California, USA) the “founder” of the combat against computer crime.

⁵²Stein Schjolberg: EDP and Penal Legislation, A presentation at the Interpol Conference in December, 1981. In cooperation with SRI International, USA, The Norwegian Research Center for Computers and Law, University of Oslo, and Interpol, Paris, he was working on a model law for computer crime laws that could be used as a remedy, or guideline for other countries.

7.7 Other Initiatives

Stanford University in California, organized in December 1999 a Conference on International Cooperation to Combat Cybercrime and Terrorism. Based on the experience at the conference, Stanford University introduced in 2000 a Proposal for an International Convention on Cybercrime and Terrorism.⁵³ At the meeting in Mexico in October 2002 the Asia Pacific Economic

Cooperation (APEC) leaders collectively committed to: ‘Endeavour to enact a comprehensive set of laws relating to cyber security and cybercrime that are consistent with the provisions of international legal instruments, including United Nations General Assembly Resolution 55/63 (2000) and Convention on Cybercrime (2001), by October 2003’.

Further, the Bangkok Declaration no. 16 reads as follows: “We note that, in the current period of globalization, information technology, and the rapid development of new telecommunication and computer network systems have been accompanied by the abuse of those technologies for criminal purposes. We therefore welcome efforts to enhance and supplement existing cooperation to prevent, investigate and prosecute high-technology and computer related crime, including by developing partnerships with the private sector. We recognize the important contributions of the United Nations and regional and other international forums in the fight against cybercrime and invite the Commission on Crime Prevention and Criminal Justice, taking into account that experience, to examine the feasibility of providing further assistance in that area under the aegis of the United Nations in partnership with other similarly focused organizations”.

8 National Legal Framework

In India, the Information Technology Act, 2000 was passed to provide legal recognition for transactions carried out by means of electronic communication. The Act deals with the law relating to digital contracts, digital property, and digital rights. Any violation of these laws constitutes a crime. The Act prescribes very high punishments for such crimes. The Information Technology (Amendment) Act, 2008 (Act 10 of 2009) has further enhanced the punishments. Life imprisonment and fine up to rupees ten lakhs may be given for certain classes of cybercrimes. Compensation up to rupees five crores can be given to affected persons if damage is done to the computer, computer system, or computer network by the introduction of virus, denial of services, etc.⁵⁴ The Act specifically deals with certain offences, which can be called cybercrimes:⁵⁵

⁵³ Available at: <http://cisac.stanford.edu> [accessed on February 18, 2013].

⁵⁴The Information Technology Act, 2000, Section 46(1-A).

⁵⁵*Id.*, sections 65–74.

1. Tampering with any computer source code used for a computer, computer program, computer system or computer network, is punishable with imprisonment up to 3 years, or with fine which may extend up to two lakh rupees, or with both. ‘Computer source code’ means the listing of programmes, computer commands, design and layout, and programme analysis of computer resource in any form.⁵⁶
2. Hacking with computer system is to be punished with imprisonment up to 3 years, or with fine which may extend up to five lakh rupees, or with both.⁵⁷
3. Sending offensive or false information through computer or a communicative device is punishable with imprisonment up to 3 years and with fine.⁵⁸
4. Receiving or retaining stolen computer resource or communication device is an offence punishable with imprisonment up to 3 years and fine up to one lakh or with both.⁵⁹ The same punishment is prescribed for fraudulent use of electronic signature, password, etc. of any other person⁶⁰ and for cheating using computer, cell phone, etc.⁶¹
5. Capturing, transmitting, or publishing the image of a private area of any person without consent is punishable with imprisonment up to 3 years and with fine up to two lakhs or with both.⁶²
6. Punishment for cyber terrorism may extend to imprisonment for life.⁶³
7. Publishing and transmitting information which is obscene in electronic form shall be punished on first conviction with imprisonment of either description for a term which may extend to 3 years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to 5 years and also with fine which may extend to ten lakh rupees.⁶⁴
8. Publication and transmission of material containing sexually explicit act or conduct is to be punished with imprisonment up to 5 years and fine up to ten lakh rupees and for second or subsequent conviction with imprisonment for a term up to 7 years and fine up to ten lakh rupees.⁶⁵ The same punishment is prescribed for child pornography.⁶⁶
9. Penalty for misrepresentation: Whoever makes any misrepresentation to, or suppresses any material fact from, the Controller or the Certifying Authority for

⁵⁶*Id.*, section 65.

⁵⁷*Id.*, section 66.

⁵⁸*Id.*, section 66-A.

⁵⁹*Id.*, section 66-B.

⁶⁰*Id.*, section 66-C.

⁶¹*Id.*, section 66-D.

⁶²*Id.*, section 66-E.

⁶³*Id.*, section 66 F.

⁶⁴*Id.*, section 67.

⁶⁵*Id.*, section 67-A.

⁶⁶*Id.*, section 67-B.

- obtaining any license or Digital Signature Certificate, as the case may be shall be punished with imprisonment for a term, which may extend to 2 years, or with fine which may extend to one lakh rupees, or with both.⁶⁷
10. Penalty for Breach of Confidentiality and Privacy: Any person who has secured access to any electronic record, book, register, correspondence, information, document, or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document, or other material to any other person shall be punished with imprisonment for a term which may extend to 2 years, or with fine which may extend to one lakh rupees, or with both.⁶⁸
 11. Punishment for disclosure of information in breach of contract is imprisonment for a term up to 3 years or with fine up to five lakh rupees or with both.⁶⁹
 12. Punishment for publishing Digital Signature Certificate false in certain particulars: No person shall publish a Digital Signature Certificate or otherwise make it available to any other person with the knowledge that (a) the Certifying Authority listed in the certificate has not issued it; or (b) the subscriber listed in the certificate has not accepted it; or (c) the certificate has been revoked or suspended. Violation of the above provision is punishable with imprisonment for a term which may extend to 2 years, or with fine which may extend to one lakh rupees, or with both.⁷⁰
 13. Publication for Fraudulent Purpose: Whoever knowingly creates, publishes, or otherwise makes available a Digital Signature Certificate for any fraudulent or unlawful purpose shall be punished with imprisonment for a term which may extend to 2 years, or with fine which may extend to one lakh rupees, or with both.⁷¹ In addition to the prescribed punishments any computer, computer system, floppies, compact disks, tape drives, or any other accessories related to the crime shall be liable to confiscation.⁷² The Act makes it clear that the provisions of this Act are applicable to any offence or contravention committed outside India by any person irrespective of his nationality if the act or conduct constituting the offence or contravention involves a computer, computer system, or computer network located in India.⁷³

⁶⁷*Id.*, section 71.

⁶⁸*Id.*, section 72.

⁶⁹*Id.*, section 72A.

⁷⁰*Id.*, section 73.

⁷¹*Id.*, section 74.

⁷²*Id.*, section 76.

⁷³*Id.*, section 75.

9 What Need to Be Done at International and National Level

High-tech and computer-related crime requires highly responsive and internationally coordinated control measures, making investigation, and reporting of such crimes resource-intensive. Countries face cost escalation, as corporations and government offices are increasingly becoming the target of cyber-attacks, the costs to maintain, protect, and restore cyber infrastructure have increased rapidly. Some of the principal problems in relation to international cooperation in the area of computer crime are identified as follows:

- (a) lack of global consensus on what types of conduct should constitute computer-related crime;
- (b) lack of global consensus on the legal definition of criminal conduct;
- (c) lack of expertise in this field on the part of police, prosecutors, and the courts;
- (d) inadequacy of legal powers to investigate and gain access to computer systems, including the inapplicability of seizure powers to intangibles such as computerized data;
- (e) lack of harmonization between the different national procedural laws concerning the investigation of computer-related crimes;
- (f) transnational character of many computer crimes; and
- (g) lack of extradition and mutual assistance treaties and of synchronized law enforcement mechanisms that would permit international cooperation, or the inability of existing treaties to take into account the dynamics and special requirements of computer crime investigation.

International harmonization of the legal categories and definitions of computer crime have been proposed by the United Nations, OECD, and the Council of Europe. Clearly, while an adequate law enforcement response capacity must be maintained, the main thrust of any law enforcement strategy for dealing with electronic crime must be one of prevention. There will therefore be a clear role for well developed social control, responsible risk management by big business and well established information security systems and procedures.

On 9–10 December , 1997, US Attorney General Janet Reno held the first-ever meeting of her counterparts from the G8 countries with the focus on high-tech and computer-related crime.⁷⁴ That the first meeting ever held among the senior law enforcement officials of the eight countries was centered on computer crime underscores the growing concerns that world leaders share about security in cyberspace.⁷⁵ In a statement to her colleagues, Attorney General Reno highlighted

⁷⁴Janet Reno, On the Meeting of Justice and Interior Ministers of the Eight, December 10, 1997.

⁷⁵Clifford Krauss, 8 Countries Joined in an Effort To Catch Computer Criminals, *New York Times*, December 11, 1997, at A12 (quoting Jack Straw, the British Home Secretary, as saying, “We’re using 19th-Century tools to face a 21st-century problem. One person can stay in the same place and commit crimes in several countries without leaving his armchair.”).

four areas where progress by the international community is critical if law enforcement is to keep pace with both technology and the criminals who exploit it: First, enactment of sufficient laws to appropriately criminalize computer and telecommunications abuses; Second, commitment of personnel and resources to combating high-tech and computer-related crime; Third, improvement in global abilities to locate and identify those who abuse information technologies; and Fourth, development of an improved regime for collecting and sharing evidence of these crimes, so that those responsible can be brought to justice.

Computer crime poses a daunting task for law enforcement agencies because they are highly technical crimes. Law enforcement agencies must have individuals trained in computer science or computer forensics in order to properly investigate computer crimes. Additionally, states must update and create legislation, which prohibits computer crimes and outlines appropriate punishments for those crimes. As technologies evolve, laws need updating so that international legal assistance can be provided, and criminals can be extradited and brought to justice. Countries must dedicate more experts to high-tech crime-fighting, and provide them with the sophisticated and expensive equipment required for their tasks. The ability to locate and identify criminals must be improved, although it sometimes seems beyond the limits of existing technologies. And various issues posed by the need to gather electronic evidence of a crime from several countries often in real-time must be resolved.

Finally, these challenges cannot be met unless a true partnership between governments and the private sector comes into being. Policymakers and law enforcement officials must recognize that law enforcement needs may place burdens on industry, which they should take reasonable steps to minimize. At the same time, industry ought to consider the safety of the public when responding to the needs of the market. An example of collaborative public-private effort in furtherance of controlling objectionable content is the Netherlands Hotline for Child Pornography on Internet, an initiative of the Foundation for Dutch Internet Providers, the Dutch National Criminal Intelligence Service, Internet users, and the National Bureau against Racism (NBR). Users who encounter child pornography originating in the Netherlands, identifiable by a domain name address ending in 'nl', are encouraged to report the site to meldpunt@xs4all.nl. The originator is warned about the posting and asked to desist from further such activity. If the warning is ignored, then the hotline will forward any available information to the vice-squad of the local police. The policing of terrestrial space is now very much a pluralistic endeavour, and so too is the policing of cyberspace. Responsibilities for the control of computer crime will be similarly shared between agents of the state, information security specialists in the private sector, and the individual user.

10 Conclusion

It is clear from the above discussion that the criminality deriving from new technologies such as computers, the Internet, and wireless communications presents daunting challenges for law enforcement around the globe. Crimes can be committed remotely, without the criminal ever setting foot in the country where the misdeed occurs or the victim is located. Critical evidence may vanish the moment the culprit ends his transmission. A hacker can route his communication through a foreign country, thereby adding an international element to his crime which may create insurmountable obstacles for law enforcement.

Law reform will be a critical aspect of the action that will be needed to ensure that policing is positioned to deal with electronic crime. It is necessary to take steps now to ensure that law enforcement will be able to respond appropriately to the various manifestations of this ubiquitous and challenging crime. This is particularly so in light of the lead up time that is required to ensure funding, establish necessary infrastructure and achieve significant legislative reform. There is much to be done if India's state of readiness is compared with that of the US or even the UK.

As the nature of cybercrime and the legal issues are global, it is only through international cooperation and coordination, that a solution can be evolved. Such approach is especially vital in the investigation and prosecution of attacks against the infrastructure of computer systems and networks. Countries must be able to prosecute cybercrimes committed by national individuals or any person domiciled in that country, whenever the acts are committed abroad. And each country should also be able to prosecute a foreigner present in the country, whenever it does not extradite the person after a request for extradition for cybercrimes committed abroad.

At this early stage of the technological revolution, it may be useful for individuals, interest groups, and governments to articulate their preferences and let these serve as signals to the market. Markets may be able to provide more efficient solutions than state interventions. To be sure, cyberspace is hardly the first or the only policy domain which lies beyond the control of any single nation state. International air traffic, the law of the sea, funds transfers, and such environmental considerations as ozone depletion and global warming, among others, have required concerted international efforts. One would expect that the development of international arrangements in response to computer-related crime will occur in a manner not unlike those which have accompanied other extra-territorial issues, from drug trafficking, to nuclear testing to whaling. Whether the realm of telecommunications will be able to achieve a better record of success than other enduring global issues remains to be seen.

Chapter 31

Globalization, Communication and Obscenity: A Feminist Perspective

Akhilendra Kumar Pandey

1 Introduction

Globalization argues for free market economy. It has increased, on the one hand, interdependence between different people and different regions of the world and technology has, on the other hand, reduced the geographical, social and cultural distance.¹ Globalization is viewed as a product of political factor expanding and strengthening capitalism. Though the globalization has given many people access to knowledge but it has not made the life better. Globalization could not bring promised economic benefit; instead of bringing unprecedented prosperity it brought unprecedented poverty.²

The post-modern society has become essentially a communication society as well as a consumer society. The behavior of the members of such a society is governed by simulations and not by reality. There has been a revolution in communication and information technology. These technologies have facilitated many things in positive direction but at the same time it has reduced considerably the barriers in depicting sexual exploitation of women by showing obscene images pornography and other forms of commercial sex, through various modes of communications. The new technological communication has increased the sexual exploitation of women locally and globally. Such technologies have enabled the people to easily procure, sell and exchange huge quantity of sexually explicit material and images. These technologies enable the offenders to cause harm by remaining invisible and anonymous as such activities may be carried out in privacy. A huge industry in pornography and other forms of commercial sex is involved

¹Manfred B. Steger, *Globalization: A Very Short Introduction* (Oxford University Press, 2003).

²Joseph E. Atiglitz, *Globalization and Its Discontents*, (Penguin Book India Ltd., 2002) pp. 5–6.

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which is enriching a few and a large community is to pay besides causing crisis to women's rights and their dignity. In this chapter, attempt has been made to argue that the law on the point appears to be inadequate. While the existing law gives an impression to protect some interest of the young children leaving adult women aside, it does not address the issue as to how obscenity can be effectively regulated without prohibiting the production of obscene material. There are countries where publication of pornographic obscene material is not prohibited and they look for market for the consumption of obscene products. This aspect has been highlighted in this chapter.

2 Globalization

Globalization has assumed a central place in any intellectual discourse. It is an ideology that dominates thinking, policy making and political practice. However, it is both—a description and a prescription. As a description, the term 'globalization' refers to the widening and deepening of the international flow of trade, capital, technology and information in a single globalized market. It identifies a complex of changes produced by the dynamics of capitalist development as well as the diffusion of cultural practice and values connected with the developmental process. As a prescription, 'globalization' involves the liberalization of national and global markets with a belief that free flows of trade, capital and information will produce a better outcome for growth and human welfare.³

There is a division on theoretical perspective of globalization. There are two views opposed to each other. One approach is to view globalization as a set of interrelated process and inevitable and necessary adjustment in the economic, political, and legal system is to be done. This approach believes that integration and readjustment are not only necessary but possible also. The other group visualizes globalization as a class project and not as an inevitable process. To them, globalization seeks to advance the interest of capitalist class.⁴ In America, there are various States where law does not prohibit production and distribution of pornography but prostitution is prohibited.⁵ The obscene materials are commodity for which the market and consumers are required. Since globalization has made the boundaries of State porous, such obscene materials may flow very easily and it has also enhanced the number of consumers in huge proportion.

³James Petras and Henry Veltmeyer, *Globalization Unmasked: Imperialism in the 21th Century* (Madhyam Books, New Delhi, 2001) pp. 11–13.

⁴Ibid.

⁵Rebecca Wishnani, Confronting Pornography: Some Conceptual Basics, *Infra* note 10.

3 Communication

The society is passing through a state of transition—from modern to post-modern. The post-modern society is virtually a society of communication, according to Jean Baudrillard. While Marx emphasized on production and did not take consumer into account, Baudrillard suggests that post-modern society is a consumer society and the culture in such society, if at all there is any, is dominated by images, simulations and hyper-reality where the originality is lost or conspicuously absent.⁶ In contemporary society, production laws and production relations are not of much significance. It is dominated and influenced by industries of knowledge having connection with cybernetic models, information process, and entertainment. The contemporary society is very much influenced by signs. Earlier, signs and reality were different but now signs and reality have merged in such a way that it has become difficult to separate them. The programmes over television and real life are not different.⁷ The story on screen and real story are the same. The contemporary capitalism is in its well-organized form. Market is consumer market.⁸ The differentiation of society is done on the basis of consumption and this consumption is being controlled and regulated by media and signs. In contemporary world the information is maximum but with minimum meaning and price. While in modern society use value of the commodity has significance, in post-modern society commodities have sign value. In other words, signs determine the value.⁹

The post-modern society is a society of ecstasy where everyone appears to be liberated uncontrolled. The value of any commodity in this society is not determined by its use and exchange but only on the basis of signs. Obscenity has become one of the important features of post-modern society. The media receives the tacit consent of mass as if obscenity is the way of human life permitting the inevitability of obscene and sexually explicit material as legitimate for men and as cool and liberated modern women they have not to tolerate it rather they have to join as an active audience. The reason for uncontrolled ecstasy is media, signs, code of signs and communication. All these factors have made the society a shallow where there is nothing except the hyper-reality. In this type of society everything is available and the man should have only purchasing power. Commercialization and consumption have caused the society to reach the stage of ecstasy.

⁶Mike Gane (Ed.), *Jean Baudrillard* (Sage Publications India Pvt. Ltd., Vol. I, 2000) Andrew Wernick, “Signs and Commodity: Aspects of the Cultural Dynamic of Advanced Capitalism”, pp. 145–162; See also, Mark Poster, “Technology and Culture in Habermas and Baudrillard”, Vol. IV, pp. 314–330.

⁷Mike Gane (Ed.), *Jean Baudrillard* (Sage Publications India Pvt. Ltd., Vol. II, 2000); Kuan-Hsing Chen, “The Masses and the Media: Baudrillard’s Explosive Postmodernism”, pp. 129–143.

⁸Mike Gane, *supra* note 6, Steven Best, “The Commodification of Reality and the Reality of Commodification: Baudrillard, Debord and Postmodern Theory”, pp. 232–256.

⁹Mike Gane (Ed.), *Jean Baudrillard*, (Sage Publications India Pvt. Ltd., Vol. III, 2000) Brian Jarvis, “Everything Solid Melts into Signs: John Baudrillard”, pp. 159–179.

4 Obscenity

Generally, prostitution and pornography are treated as two different practices. The distinction between the two lies mainly on the ground that in prostitution the woman and the buyer are in the same room while in pornography they are in non-synchronized state. This distinction has blurred with the advancement of technology. Those who patronize pornography feel that there is nothing wrong in it. Thus in various jurisdictions of America, it is not legal to purchase sex from a prostitute in person but production and distribution of pornography are legally permitted. This distinction reinforces the perception of common man that prostitution and pornography are different from each other and that pornography is less harmful. In fact, pornography is the documentation of prostitution. Pornography is technologized form of prostitution.¹⁰ In traditional prostitution, a pimp can sell the sex of a woman to one customer at a time. But with the innovation of web camera the pimp may sell the sex to many at the same time. The person engaged in industry will have to pay the woman less but the maker and the pimp shall generate enormous money. The customer is happy that though he now experience sex with a woman at some technological remove but he is getting the goods at much lower price. The technology has made the sexual experience cheaper, legally safer and the customer remains anonymous more than ever. But in doing so, in any case, he causes a substantial damage to the woman's privacy and dignity.¹¹

During last 20 years the visibility of pornography has increased in India. Pornography and prostitution are two main forms of obscenity. Obscenity in its various forms including pornography and prostitution has assumed the shape of a huge multibillion dollar industry. According to estimation this industry has swollen to one thousand times within a span of 30 years.¹² This industry enriches a small minority and leaves a larger community to pay for damage. People used in it need medical treatment for various reasons including infectious diseases, post-traumatic stress disorder and suicide attempts besides promoting alcohol and drug related problems. While the society pays for medical treatment and insurance cost, the operators of obscenity industry do not pay for these instead they manage to avoid paying tax to State.

The technologies of pornography are dynamic. Once, video porn was a huge step against magazines and films. It was not only cheap to rent and watch in privacy and anonymity. As it was cheaper and easy to make, thus it opened a huge market. Video has become old now. Porn web has replaced and made realistic porn video

¹⁰Rebecca Whisnant, "Confronting Pornography: Some Conceptual Basics", in Stark and Rebecca Wishnант (eds.) *Not For Sale: Feminist Resisting Prostitution and Pornography*, (Aakar Books, New Delhi, 2007) pp. 15–27.

¹¹Donna M. Huges, "The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children", in Stark and Rebecca Wishnант (eds.) *Not For Sale: Feminist Resisting Prostitution and Pornography*, (Aakar Books, New Delhi, 2007) pp. 38–55.

¹²Supra note 10.

where the consumer can enter. Business without customer has no sense. In other words, no business can afford to create a product unless there are buyers for such products. Traditionally, the business of obscenity is, in its all form, the use of real human beings to support the fantasy of others. But this real relationship with real people may result in many limitations. Some people do not want real relationship. They want sex to play in their own heads. Thus when one wants to support his fantasy with pictures, etc., the sex industry is ready to supply the demand. The information technology has turned the traditional customer to user. This user is self-centered and wants his need to be satisfied without any intention to cause harm to others. The user does not care a straw for the willingness or unwillingness of the person he is using to satisfy his fantasy. Rather, he feels satisfied with whatever and whenever he wants on payment of fee. He also feels that the fee paid by him must cover the harm, if any, caused to other person. In this way he, on the one hand, protects his respect and appearance and, on the other hand, provides the businessman engaged in sex industry a huge income. This leads to creation of a wrong feeling in the user that pornography and prostitution are victimless crimes. It has been observed that today's porn consumer are no longer satisfied with the old ordinary male dominated sexuality; they expect something extra, an extra charge which comes from women being pushed to their limit.¹³ In fact, this perception is detrimental to dignity and womanhood.

Harm and offence are two different concepts. Offence takes place in mind and the location of harm is out of mind. While offence is a way of feeling bad and it may be avoided by removing the stimulus that generates bad feeling, harm is an objective condition and not a way of feeling. Harm involves set back to one's interest. One may be harmed even without feeling or knowing it. On the contrary, no one can be offended without knowing it. It is generally argued that women involved in pornography do not suffer harm as they consent for it. In fact, many times it is done without the knowledge or consent of women; alternatively even where consent is obtained it is given under misconception. Eventually, the mass production and consumption of pornography harms women in general as it is not only a factor to trigger violence and discrimination against women but it also conditions its users to consider women as a sexual object entitled for humiliation and degradation.

Pornography and war are two different things but it was found during Gulf War of 1991 that the US military pilots watched pornography before undertaking their flying missions. It normalized the aggression against the country as they had watched porn video before accomplishing their missions.¹⁴ Thus, pornography and wars both depend on the process of rendering human being into less and sub-standard human being by inflicting hurt upon them. While pornography provided pleasure to pilots before bombing, war protected the material comfort of America

¹³Ibid.

¹⁴Rober Jensen, Blow Bangs and Clustre Bombs, "The Cruelty of Men and Americansin Christine", in Stark and Rebecca Wishniant (eds.) *Not For Sale: Feminist Resisting Prostitution and Pornography*, pp. 28–37; See also, Kelly Oliver, *Women as Weapons of War: Iraq, Sex and Media* (Seagull Books, Calcutta, 2008).

and its people. But in both the situations, it was the women who were downgraded and offended. Women can be downgraded for sexual pleasure of men and several armless civilians may be killed to protect the consumerist pattern and affluence of one society. It may not be thus inferred that the pornography stands for sexual freedom nor does the war.

5 Legal Control of Obscenity

The Universal Declaration of Human Rights, 1948 recognizes the inherent dignity and equal and inalienable rights to all the members of human family as bedrock of freedom and justice. The Declaration also prohibits inhuman and degrading treatment to any member of the human family.¹⁵ The Convention on Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) also recognizes equal worth and dignity of men and women and prohibits discrimination against women in any form. Article 6 of the CEDAW mandates the State parties to take appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women. In other words, the specific thrust of the CEDAW is on suppression of exploitation of women by prostitution and it is silent on obscenity depicted through women, that is, pornography. It is clear that the universal Declaration of Human Rights and the CEDAW both speak for equality of dignity and worth among all the members of the human family but are conspicuously silent on indecent and obscene depiction of women in sexually explicit materials. There is thus a need to recognize that pornography tantamounts to prostitution and both must be prohibited through International Conventions. Further, there is a need to regulate wars by curbing the practice of watching pornographic material before shelling the enemy country as such a practice not only degrades the women but also enhances brutality among the soldiers against unarmed civilians. It may be suggested that an international arrangement to prohibit production and distribution of sexually explicit pornography is desirable to protect the dignity and human right not only of women but also of entire mankind.

The municipal laws prohibit sale, etc., of obscene books, the Indian Penal Code, 1860 for example, seeks to punish those persons who sell, let no hire, distributes, publicly exhibits or puts into circulation, exports, etc., the obscene material. Further, only those materials are treated as obscene which are lascivious or which appeals to the prurient interest and its effect is such as tends to deprave and corrupt persons in whose hands it is likely to fall.¹⁶ The central theme of the provision is that the production and consumption of obscene material is not prohibited provided the consumer have attained such an age or mental status that his mind is not likely to be depraved and corrupted. In other words, the prohibition is not on production

¹⁵The Universal Declaration of Human Rights, 1948, Article 5.

¹⁶The Indian Penal Code, 1860, Section 292.

but on circulation. It involves contradiction that pornography is permitted to be manufactured but its circulation should be restricted only to the hands of limited consumers whose mind is not likely to be affected. It is thus suggested that the law should not create limited prohibition rather it should completely ban the production and distribution of pornographic obscene material. When the commodity will not be available naturally its consumer will not be there. The million dollar industry of many countries has to suffer economic setback which would be fatal for the ideology of globalization, it may possibly be argued.

The Information Technology Act, 2000 was enacted to provide a legal framework for all those transactions which were to be made through electronic communication. This legislation also seeks to punish publication and transmission of obscene and sexually explicit material in electronic form.¹⁷ The provisions are materially the same to that of the Indian Penal Code except that while the Information Technology Act prohibits the publication or transmission in electric form, the Indian Penal Code prohibits printing on paper, pamphlets, figure, painting, drawing, etc. This enactment also does not put restriction on production of obscene and sexually explicit materials. Alternatively, the production of sex commodity in the form of pornographic depiction has not been restricted. The capitalist after investment will naturally seek the potential market for the sale of its product. The modern communication technology is thus a good servant in the hands of the capitalist to serve the potential consumer without risk at the borders. It has sneaked into every home and is available easily. There is thus a need to put restriction on not only the distribution and sale of obscene materials but on its production as well.

6 Conclusion

In various countries, the production and the distribution of obscene and sexually explicit pornographic material have assumed the shape of massive sex industry involving several billions. There is no legal prohibition on the production and distribution of such materials. When the product is ready, market is another aspect. The capitalist finds potential market and consumers in those countries where sex is a taboo and production and distribution of obscene material is not legalized. Globalization has given them an opportunity to sell the products and the countries have to open their borders for free flow trade. The post-modern society is the society of consumers and technology. The globalization has enhanced the number of consumers and modern technology has provided necessary help in this regard. The globalization could not bring unprecedented economic benefit but it has brought unprecedented humiliation to women by demeaning the sanctity of her body and soul. It is not possible to regulate the massive sex industry engaged in the production of pornography unless the production is also prohibited by law.

¹⁷The Information Technology Act, 2000, Section 67, 67A, and 67B.

The human dignity and the rights of women can only be saved if an international instrument is adopted for halting the production of pornography with a view to protect the human rights of all in general and of women in particular.

Chapter 32

Taxation of E-Commerce: Problems and Possible Solutions

Dinesh Kumar Srivastava

1 Introduction

Taxes are of two kinds: Direct Taxes and Indirect Taxes. In the area of e-commerce, problems arise in Taxation of Income in the field of Direct Taxes and imposition of Customs Duty and Sales Taxes in the area of Indirect Taxes. In India, Income Tax and Customs Duty are imposed by the Central legislature whereas Sales Tax on sales that take place inside the state is levied by respective State legislatures.¹ Central Sales tax is imposed by the Central legislature in the cases of sales taking place in the course of inter-state trade or commerce but the tax is collected and appropriated by the State from where the goods are sold. Where the sale takes place in the course of import into India, or export out of India, no tax is levied under the Central Sales Tax Act or under the Sales Tax laws of the States.

2 Taxation of Income from E-Commerce

2.1 General

There are no separate provisions within the income tax laws that deal exclusively with Electronic Commerce (EC). Therefore, where relevant, the present provisions of the Income tax laws and their interpretations would be applied to EC transactions.

¹Although Sales Tax in the states have been replaced by Value Added Tax, in India, Value Added Tax itself is not a tax, rather it is a method of computation of tax which can be applied in computation of any indirect tax, Value Added Tax in States derives its validity from Entry 54 of List II of Seventh Schedule to the constitution i.e. “Taxes on the sale or purchase of goods.....”.

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In the case of Income Tax on incomes arising from e-commerce, problems arise only when the question is for taxation of income of a non-resident from transactions in India by way of e-commerce. By virtue of Section 5 (2) of the Indian Income Tax Act, 1961 any income of a non-resident is taxable in India only when it is received or is deemed to be received in India or it accrues or arises or is deemed to accrue or arise in India. This is called as taxation of income of a non-resident by a country where the source of income is situated as income of a person can be taxed either by the country of which he is resident or by a country where source of his income is situated. Where income of a person is taxed in the country of source, the country of residence has the obligation to give relief from double taxation. Such relief is granted either by exempting such income from taxation in the country of residence or by giving credit for taxes paid in the source country.

For incomes received in India or deemed to be received in India again there is no problem because of e-commerce. The problems may arise in case of e-commerce while determining as to whether income can be said to have accrued or arisen in India. Section 9 of the Income Tax Act lays down certain circumstances when incomes are deemed to accrue or arise in India. The important amongst them where controversies arise because of e-commerce are as follows:

- i. income accruing or arising whether directly or indirectly through or from any business connection in India;
- ii. income by way of royalty or by way of fees for technical services payable by:
 - a. a person who is a resident, except where the royalty or fees is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or
 - b. a person who is a non-resident, where the royalty or fees is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purpose of making or earning any income from any source in India.

2.2 *Income Through or from Business Connection*

To establish a business connection, an element of continuity between the business of the non-resident and the activity in India is considered necessary. The concept of ‘business connection’ is similar to that of the rule of permanent establishment (PE). The presence of source of income in a country requires a PE of the assessee in that country. PE by definition relies on a fixed place of business or an agent. If an assessee exports goods to several countries without establishing offices in those countries, its income will be taxable only in the country of which he is resident. Prior to advent of internet it was not being considered possible to export large

quantity of goods in a country without having PE in that country. In e-commerce, however, a non-resident businessman does not need a fixed place of business or an agent in another country for making sales on large scales in that country. Orders may be placed through e-mails or websites and the goods may be directly dispatched through shipping documents. Further digital goods like journals, books, music, movies, plans, designs, drawings and games may be sold in any country without having PE.

2.2.1 Factors Playing Roles in E-Commerce

1. Website: Website is a set of documents belonging to any person or organisation. It consists of data and programmes in digitized form, i.e. a combination of electronic data and software. It may perform any of the following three functions:
 - i. Advertising only: The website may perform only the role of advertising the products of the businessman. In such cases customers may have access to the website and obtain informations about the product and if satisfied may proceed further to buy the product through traditional means, i.e. by placing orders by telephones or mails, making payments by cash, cheques, money orders, credit cards, etc., and delivery of goods through a carrier.
 - ii. Advertising and sales both: The website alongwith performing the functions of advertisement may also have the facilities of concluding the contract online for purchasing the product by making payments through credit card. Once the payment is made by credit card, the goods may be delivered to the purchaser through the carrier.
 - iii. Advertising, sale and delivery of digital goods: Besides advertising and concluding the contract of sale, the website may also have facilities of online delivery of goods sold, through Internet. This can of course be done only in case of goods in digitized forms. This range of goods is ever increasing. Texts like books and journals, visual materials like movies and plays, audio materials like songs and musics, further designs, drawings, maps, etc., may be in digitized form and can be transferred from one point to another through internet in the form of data.
2. Server: Website is stored on a server. Server is a piece of machinery.

It carries out activities initiated by an end user's computer. The server may be owned by the person carrying the business or it may be taken on lease from another person owning the machinery, generally the Internet Service Provider. Server may be installed at a fixed place on the land or it may even be installed on a mobile vehicle. It can be easily replaced from one place to another.

2.2.2 Permanent Establishment in E-Commerce

An important question which needs to be answered is whether any of the following may be regarded as Permanent Establishment:

- i. Mere regular existence of a website on the soil of a country on downloading of the website whether constitutes a permanent establishment of the owner of the website in the country where the host computer resides on which the website is downloaded.
- ii. Whether location of server (the machinery on which website is stored) in a country will constitute a permanent establishment of the website owner whose website is stored on that server in such country.

Whether Website is a Permanent Establishment

Permanent Establishment is defined in Article 5 of both the OECD as well as in the UN Model Conventions.² The term ‘permanent establishment’ means a fixed place of business through which the business of an enterprise is wholly or partly carried on. With regard to Electronic Commerce Para 42.2 of the Commentary to Article 5 of the OECD Model Convention cited with approval in the Commentary to Article 5 of the UN Model Convention after discussing the meaning of Permanent Establishment lays down that an Internet website does not in itself constitute tangible property. It therefore does not have a location that can constitute a ‘place of business’ as there is no facility such as premises or machinery or equipment. Hence a website can not constitute a Permanent Establishment. Hence, simply because consumers can know about the product or place orders or may purchase digital goods of a foreign resident through his website will not subject that foreign resident to income tax in the country where the customer lives.

Whether Server on which website is stored constitutes Permanent Establishment of the website owner in the country where the Server is located

As observed earlier, the person who owns the server may be different than the person who carries on business through website stored on the server, i.e. owner of the website. In such cases, website owner will not have control over the operation of the server. The server may be moved from one location to the other on the wishes of the owner of the server. Para 42.3 of the Commentary to Article 5 of the OECD Model Convention cited with approval in the Commentary to Article 5

²See OECD Model Tax Convention on Income and on Capital, 2010; and United Nations Model Double Tax Convention, 2011.

of the UN Model Convention³ lays down that in such a case location of the server cannot be considered as place of business of the website owner. On the other hand if the website owner has his own server either as owner or has taken the same on lease and operates the server on which the website is stored and used, the place where that server is located may constitute a permanent establishment of the website owner if other requirements of Article 5 are fulfilled. Para 42.4 of the commentary further lays down that in order to constitute a fixed place of business, a server will need to be located at a certain place for a sufficient period of time. The exact period of time is not specified. Thus, creating uncertainty among the nations for fixing the period in specific tax treaties. Para 42.7 again lays down that no permanent establishment may be considered to exist where the electronic commerce operations carried on through computer equipment at a given location in a country are restricted to the preparatory or auxiliary activities only. Thus, web server in a country that merely displays advertising or other informations of the product will not result in Permanent Establishment of the website owner in that country even if he owns or has control over the server on which web site is stored. On the other hand a fully automated web server that displays informations, takes orders and delivers digital goods or services may be considered as permanent establishment of the person doing the business if he owns the server or has taken it on rent to host his website. Para 42.9 of the commentary explains as to whether any activity constitutes the core functions or merely preparatory or auxiliary functions of an enterprise will depend on the nature of the business carried on by that enterprise. For example, some ISPs (Internet Service Providers) are in the business of operating their own servers for the purpose of hosting websites or other applications for other enterprises. For these ISPs, the operation of their servers in order to provide services to customers is an essential part of their commercial activity and cannot be considered preparatory or auxiliary.

Now when an enterprise will know that under the above situation location of server will result in Permanent Establishment in the country where it is located, it will try to locate or establish its server in a country which is more tax friendly that is in a country where either no tax is levied on the income of the foreign enterprises or if levied, tax rate is very low. Again it will violate principle of neutrality to tax where server remains fixed in a country and where it is on a mobile vehicle and remains shifting from one country to another country. Hence it would not be logical to treat a server as a permanent establishment in any circumstance.

Outcome

Thus, concept of Permanent Establishment cannot be applied to E-commerce. All attempts of applying the concept of Permanent Establishment to e-commerce are bound to fail. On the other hand, non-taxation of the incomes on sale of the goods

³Ibid.

through electronic commerce may incur a great revenue loss to the country in which they are sold which would have taxed had the transactions been carried out through Permanent Establishment. Therefore, new rules for taxation of income needs to be framed which should be internationally recognised for taxation of income of non-residents from sales of the goods in the country where goods are consumed. One suggestion may be that anyone receiving more than certain amount from a country in any financial year on sale of goods in that country will be liable to pay income tax in that country in accordance with the rules made in this behalf even though he has no Permanent Establishment in that country. The payers may be made liable to deduct tax before making the payment, i.e. application of what is called as withholding tax or deduction of tax at source.

2.2.3 Business Income and Income by way of Royalties, Fee, Interests, etc.

In conventional form of commerce when all rights in goods are transferred it would amount to a sale giving rise therefore to business income. On the other hand when only limited rights in a property are transferred, the income arising there from would be classified either as a royalty in the case of intellectual properties or a rent for the use of tangible properties. If the transaction is for rendering of services, the income may be characterised as fees for technical or professional services. If a particular income is classified as income from sales, then the country in which the goods are sold will have no right to tax the income arising from such sales unless there is a Permanent Establishment in the country to which the goods are sold. Even if there is a Permanent Establishment in the country to which goods are sold, only that portion of the income will be taxable in the importing country which is attributable to such Permanent Establishment. On the other hand, if the income is classified as royalties or fees for technical or professional services, or interests or dividends then irrespective of the existence of a permanent establishment, the income will be liable to tax in the country from which payment is made. It may be argued that when the income of a person from goods sold to the other country without having Permanent Establishment in that other country is not taxable by the importing country though it is used in the importing country then why should royalty income for use of technology or rental income for use of tangible property be taxable by the importing country? OECD Model Tax Convention clearly recommends that royalty income should be taxed only in the country of residence.⁴ Thus taxing royalty in the country of payment or use is an exception to the OECD convention. However, almost all countries including India⁵ have ignored the OECD recommendation and levied withholding tax on royalty payment. Thus, neutrality

⁴The OECD Model Tax Convention, 2011, Article 12.

⁵The Income Tax Act, 1961, Section 9 (1)(vi)(b).

between ‘tangible goods’ and ‘services and intangibles’ has been sacrificed in case of income from royalties or services.

2.2.4 Categorisation of Income

When tax depends on categorization of income, all non-resident assesses will try to categorise their income as business income and tax department will try to categorise it as royalty or fee for technical or professional services.

Because of the developments of digital technology, it is possible to sell journals, books, music, movies, software, etc., electronically as well as physically. This raises the question of classification of income particularly in the case of sales of software programmes. Purchase of computer software for day to day business is now common. Most software is developed outside India by foreign companies and then sold here. The substantial importation of software has led to an interesting debate as to whether payment for the import of software is in the nature of royalty income or merely a sale of goods for non-resident software sellers. This controversy arises because of the inability to identify whether software is tangible or intangible and whether it should be treated as a licence, producing royalty income, or an income from sale of goods. Controversy also arises in determining whether software is protected as a patent or as a copyright, and how it should be treated for sales tax purposes when bundled with other items or services. Generally, software is protected by the copyright law. However, certain software may be protected by the patent law. If sale of a software programme is considered as sale of goods, income earned will amount to business income and the country from which the payment is made on its import cannot tax the same in absence of Permanent Establishment of the exporter in the importing country. However, if such income is deemed to be a royalty for use of copyright or patent, the same will be taxable in the country from which the payment is made even in absence of a permanent establishment.

There are various judicial precedents⁶ where it has been held that the payment for right to use software would not be treated as ‘royalty’. In most of these judicial precedents a distinction has been drawn between the term copyright and copyrighted article and it has been held that copyrighted article is distinct from copyright per se and payment for copyrighted article, therefore, cannot be treated as payment for copyright. While payment for use of copyright is covered by the definition of ‘royalty’, the payment for use of copyrighted article would not be covered by the

⁶*Motorola Inc v. DCIT* [2005] 95 ITD 269 (Del) (Special Bench); *ADIT v. Tata Communications Ltd.* ITAT (Mumbai) (ITA No. 1473/Mum/2009); *DDIT v. Alcatel USA International Marketing Inc* [2009] 43 SOT 31 (Mum); *DDIT v. TII Team Telecom International Ltd* [2010] 40 SOT 28 (Mum) (URO); *Kansai Nerolac Paints Ltd v. ADIT* [2010] 134 TTJ 342 (Mum); *ADIT v. Solid Works Corporation* [2010] 42 SOT 13 (Mum) (URO); *Velankani Mauritius Ltd v. DDIT* [2010] 132 TTJ 124 (Bang); *DDIT v. Reliance Industries Ltd.* [2011] 43 SOT 506 (Mum); *DIT v. Ericsson A.B.* [2012] 204 Taxman 192 (Del).

definition of ‘royalty’.⁷ However, Karnataka High Court in the case of *CIT versus Samsung Electronics Co. Ltd*⁸ had held that payments made for purchase of shrink-wrapped software are in the nature of royalty. The ruling arose out of a batch of appeals filed by companies which were distributing shrink-wrapped software to customers (end users) as well as companies that imported software for their own use. The appeals were earlier disposed of by the Karnataka High Court taking the view that it is not open to the taxpayer to take a unilateral view on the chargeability to tax in India of payments made to non-residents for the purposes of deduction of tax on source under Section 195 of the Act. Accordingly, it held that all payments to non-residents would be subject to withholding tax, irrespective of chargeability under the provisions of Section 195 of the Act, unless a specific dispensation was obtained from the Revenue authorities. In doing so, the court did not rule on the characterization of the payments as either royalties or business profits. On appeal, the Supreme Court in *GE India Technology Centre Private Limited v. Commissioner of Income Tax*⁹ observed that such a sweeping interpretation of Section 195 is not warranted. The Supreme Court thereafter directed the Karnataka High Court to rule on the chargeability of payments made for software imports in order to establish the liability for the withholding tax. It was in the backdrop of this reference by the Supreme Court that the Karnataka High Court was required to rule on the characterization of payments made for imports of software. The Karnataka High Court then held that the amount paid for the shrink-wrapped software is not the price of the CD alone, nor the software alone, nor the price of licence granted. It is a combination of all and in substance, unless the licence is so granted the ‘dumb CD’ containing the software would not in any way be helpful to the end user, since the software would become operative only if the same is downloaded to the designated hardware. This is what makes the difference in a computer software and copyright in respect of a book or pre-recorded music. There is no similarity between the transaction of purchase of a book or pre-recorded music CD and the CD containing the software. It is for this reason that the literary works like books and other articles should be treated separately from computer software. Accordingly, the payments made for the software imports are for certain rights in the copyrights, along with the media on which it is purchased as well as the software. Hence, it meets the definition of royalty under the Act. Consequently, the payments would be chargeable to tax in India and withholding tax provisions under Section 195 are applicable.

⁷The decisions find support from the observations of the Supreme Court in *Tata Consultancy Services v. State of Andhra Pradesh* (a case under Sales Tax law) [2004] 141 Taxman 132 (SC) wherein the Supreme Court held that software is “goods”. On the basis of this decision of the Supreme Court, many Tribunals and High Courts held that income earned by the overseas vendors from sales of software are “business income” and as the overseas vendors did not have a Permanent Establishment (“PE”) in India, the business income was not chargeable to tax in India.

⁸[2011] 203 Taxman 477 (Kar); See also *Millennium IT Software Ltd., in re*, [2011] 338 ITR 391 (AAR).

⁹[2010] 327 ITR 456 (SC).

Moreover, the Indian Income Tax Act, 1961 has been amended by the Finance Act, 2012 and Explanation 4 has been added to Section 9 (1) (vi) of the Income Tax Act to make it clear that transfer of all or any rights in respect to intellectual property or information includes transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred. Therefore, income in the nature of royalty arising in the hands of entities selling computer software in CD's, selling shrink-wrap software's and subscription to online database will be subjected to taxation as 'royalty'. However, the Delhi High Court has ruled that income from sale of software embedded in hardware was not taxable as royalty despite the retrospective amendment to the Income Tax Act, as the changes cannot override a tax treaty.¹⁰

So far as digital materials like journals, books, music, movies, plans, designs, drawings, games, etc., are concerned, it is submitted that the manner in which they are transferred makes material difference to the nature of transaction. If the digitized materials are put on a media like floppy, computer disks, pen drive or even embedded on a computer before the sale, the same would be treated as goods. If however, digitized materials are delivered online or down loaded through the internet, the same should not be treated as goods as the judgment of the Supreme Court in *Tata Consultancy Service*¹¹ case is applicable only in case where digitized material is put on a media before sale. Delivery of content online would not amount to a transaction in goods as the content has not been put on a media before sale. It is submitted that delivery of content online for consideration, would amount to providing of services and Service Tax may be imposed on such services and principle of withholding tax may be applied.

2.3 *Customs Duty*

Where the transaction is concluded online, but goods are tangible and requires to be physically delivered, Customs Duty may be imposed when the goods pass the customs barrier. Similarly if the digitized materials are put on a media like floppy, computer disks, pen drive, etc., and the same is exported, it has to cross the customs barrier for delivery and there is no problem in imposing Customs Duty in such cases. It is only when the digitized materials are delivered online and they cross the border of a country electronically from the computer of the exporter to the computer of the importer without going through the customs barrier, Customs Duty cannot be imposed. As discussed earlier, such digitized materials are not goods and therefore there should be no question of imposition of Customs Duty. However, Service Tax

¹⁰Director of Income Tax v. Nokia Networks OY IT Appeal nos. 359 of 2005, 1137 and 1138 of 2006, 503, 505, 506, 512 and 1324 of 2007, 30 of 2008 decided on September 7, 2012.

¹¹Supra note 6.

in such cases may be imposed by the Central Government and the importer may be made liable to deduct the tax at source (withholding tax) before making the payment to the foreign exporter of services.

2.4 Sales Tax

In the cases of sales of corporeal or tangible goods, sale is deemed to take place in the State in which they are at the time when the contract of sale is made and that State has right to impose Sales Tax on the sale of such goods. The same criteria may be applied where digitized materials are put on a media like floppy; computer disks, etc., and they are sold. Since floppy, computer disks, etc., containing digitized materials are just like physical goods, *situs* of sale can easily be determined and sales tax may be imposed. When digitized materials are sold online through internet, as discussed earlier, they are not sales of goods and therefore States cannot impose sales tax on such sales. However, Service Tax may be imposed in such cases by the Central Government by imposing tax on the seller as service provider.

3 Conclusion

The foregoing suggests that concept of Permanent Establishment cannot be applied to e-commerce. All attempts of applying the concept of Permanent Establishment to e-commerce are bound to fail. On the other hand, non-taxation of the incomes on sale of the goods through electronic commerce may incur a great revenue loss to the country in which they are sold which would have taxed had the transactions been carried out through Permanent Establishment. Therefore, new rules for taxation of income requires to be framed which should be internationally recognised for taxation of income of non-residents from sales of the goods in the country where goods are consumed. One possible solution may be that anyone receiving more than certain amount from a country in any financial year on sale of goods in that country will be liable to pay income tax in that country in accordance with the rules made in this behalf even though he has no Permanent Establishment in that country. There was a long standing controversy regarding nature of income of a non-resident from export of software programmes in India. However, that controversy has been set at rest by an explanatory amendment of Income Tax Act by Finance Act, 2012. Online delivery of digitized contents other than software programmes would not amount to a transaction in goods rather it will amount to providing of services and Service Tax may be imposed on such services and principle of withholding tax may be applied. The same suggestion may be extended for custom duty and imposition of Sales Tax by the States where digitized materials are put on a media like floppy; computer disks, etc., and are sold, the *situs* of sale can easily be determined and sales tax may be imposed since floppy, computer disks, etc., containing digitized materials are

just like physical goods. When digitized materials are sold online through internet, they should not be considered as sales of goods and therefore States should not impose sales tax on such sales. However, Service Tax may be imposed in such cases by the Central Government by imposing tax on the seller as service provider.

Chapter 33

Legislation for Domain Name Registration: A Requirement in Globalisation

Ravindra Wakade

1 Introduction

The purpose of this chapter is first to examine and to comment on the basic issues related to domain names; secondly to look at the trends in the case law in the US and to highlight a number of the issues that flow from them; thirdly to explain the policies of the regulatory bodies and deficiencies regarding the same; fourthly to discuss the policy structure of the Indian counterpart and lastly the need for legislation for the domain name is emphasised. With the rise of the internet, the domain name has acquired a newfound interest. With the internet, e-commerce started to pave its way to a life of a common man.

Domain name is basically the method of identifying and accessing websites and matches IP address through Domain Name Server (DNS) system. Domain name is given by Domain name registries which are at country level or at a worldwide level. Domain name refers to an address for the location of the website on the internet. These are expressed in alphanumeric form and the computer known as a Domain name server matches these names to the numerical Internet Protocol (IP) addresses.

Whenever a user of internet types a domain name with the help of an application like browser, the browser sends the name to Domain Name Server (DNS) computer. It searches a database of IP addresses of domain names. When a match is found, the link is established, and the communication is established. Hence, it becomes necessary to have one address for one domain name. Also, the domain name is a label which anybody can recognise instead of a string of numerals. The domain name has a semantic association with the activity of the business or name of the business that is in short registered trademark or trade name.

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2 Domain Name and Commerce

The process of registering a domain name is inexpensive, potentially anonymous, and virtually instantaneous. A registrant seeking to register a domain name may contact via the Internet, has to execute an online Domain Name Registration Agreement, and secure registration of a domain name which is a matter of seconds on a “first-come, first-served” basis. The registering authority neither screens domain-name applications, nor determines the conflicting claims of rights to use a domain name which includes rights under the trademark.

The trade name can be expressed only in one way in the internet world through the domain name. All other names which are same or similar have to look for the alternative name in internet world which makes it unattractive prospect as far as business is concerned. Hence, the competition for such scarce resource requires a legal mechanism for better allocation. This scarcity of internet resources is generated from the factors namely technical uniqueness, semantic uniqueness, economic uniqueness and origin uniqueness.¹

The E-commerce has generated the necessity to own domain name. It also necessitated the association of existing trade name with the Domain name for better advantage. The domain name is considered to be part of goodwill and intellectual property and it deserves protection from unhealthy business practices. The intellectual property regime has brought it, within legal purview. Commercial use of domain name namely disseminating information, advertisement and sale led to the growth of generic top-level domains (gTLDs).

Domain name operates on the hierarchy of names. At the top level, domain name is divided into two categories

- i. Generic top-level domains that is gTLD
- ii. Country Code top-level domains that is ccTLD.

3 Domain Name and Law

Domain name is acquired by a contract. Hence, the rights which are received by the registrant are contractual rights. The reason for conflict is that the domain name is unique and trademark comes from multiple sources. The legal rights in trade name/mark come from two sources that are registration under trademark law and from actual long and uninterrupted use.²

As the internet has international application and the trademark, by and large, remains in the domestic legal regime, hence the disputes assume a complicated and impractical outlook. Though originally the international legal framework initially

¹Chris Reed, *Internet Law- Text and Material*, (Cambridge University Press, 2nd ed., 2004) at 41.

²Passing off action in Law of Torts.

did not consider including domain names within its ambit.³ But it had acquired an important status as WIPO has established a separate alternative dispute resolution mechanism and has been successful.⁴

Parallel and alternative deceptive use of the domain names attracted transfer of the domains to the original users.⁵ Initially, internet only played a role as identifiers of websites. Hence, the policy of registration was on the first come first served basis. But subsequently, the internet regime spread over and included the commercial transactions.

The registrant and trademark holder are two different persons. The trademark holder is not a party to contract between the domain name registry and domain name applicant. The solution to this dichotomy would have been that firstly the domain name should be conferred legal status instead of contractual just like other IPR. Secondly, the registry should have assessed by a simple computer search in trademark database to avoid the conflict (nationally and internationally). If this modality is followed then there will be a significant reduction in the number of disputes.

Some ccTLDs are open, as they pose no restriction on person or entities that may register second level registrations in them. Others are restricted which emphasise on the conditions and criteria before registration. Majority of the Governments delegated the power of registration and licensing to companies who act as registrars to sell domain names.

It is important to note that for registration of the domain name distinctiveness is considered material.⁶ Additions to existing trademark make the domain name distinctive and such trademark with additions may be registered without any conflict.

3.1 Disputes

Initially the domain name allocation on the basis of ‘first come first serve’ was held valid by courts of law.⁷ It also necessitated synchronisation with existing trade names. It also adds value to the trademark. It also led to the disputes as there can be many business houses under the same trademark and the domain names can only be unique. As registration for a domain name is on first come first served basis

³The Paris Convention for the Protection of Industrial Property, 1883, as revised at Brussels on December 14, 1900, at Washington, on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979.

⁴Since December 1999, the WIPO Arbitration and Mediation Centre have administered over 27,000 proceedings, primarily in the generic Top-Level Domains gTLD . available at: <http://www.wipo.int/amc/en/domains/>.

⁵*Hermes International v. Yuanyuan Deng/Deng Yuan*, Case No. D2011-0001, WIPO Arbitration and Mediation Center, Administrative Panel Decision.

⁶*Nationbanc Montgomery Securities LLC Application*, 2000 ETMR 245.

⁷*Interstellar Starship Services Ltd. v. Epix Inc.* Civ. No. 97-107-FR (D Or, 1997).

and trademark owners have no prior right to a domain name incorporating their mark. Hence, there are disputes between trademark owners and registrants. This opportunity is seized by a number of people who had registered domain names which were famous/well-known trademarks before the concerned business houses could register them. This aimed at either getting profit by selling the same to the concerned business houses or to exploit the reputation of well-known brands for the promotion of own business.⁸ Another form of dispute arose out of use by internet participants who use adaptation of well-known trademarks or who has registered mark as a name, which were pursued by the business houses who seek to prevent the same.⁹ Another form of abuse of the domain name is registering common misspellings of the well-known domains.¹⁰

3.2 Dispute Resolution System

Initially four dispute forums were recognised namely WIPO, the National Arbitration Forum (NAF), the Asian Domain name Dispute Resolution Centre (ADNDRC) and Czech Arbitration court.

These disputes resolution systems related to either gTLD or ccTLD.¹¹ The operators of gTLDs have dispute resolution policy known as Uniform Domain Name Dispute Resolution Policy (UDRP) used by ICANN.¹² For ccTLD, the registrars adopt their own private policies or use UDRP voluntarily. Also, it is pertinent to note that disputes regarding domain names being expensive, it proved to be a formidable factor in developing jurisprudence regarding the domain names.

4 Tenets in Deciding Disputes

For understanding the policies and principles regarding dispute resolution, firstly it can be gathered that the courts looked down upon the incidences of cyber squatting as instrument of fraud. The domain names which were registered to take advantage

⁸This is popularly called either domain name hijacking or cyber squatting.

⁹It is named as reverse domain name hijacking.

¹⁰This category is named as typosquatters. A common misspelling of the intended site, a misspelling based on typing errors, a differently phrased domain name and a different top-level domain. Sometimes, the typosquatters will use the false addresses to distribute viruses, adware, spyware or other malware. Some are also shock sites. More common are benign domain parking sites, selling advertising to firms based on keywords similar to the misspelled word in the domain.

¹¹Country code top-level domain names, each of these domains bears a two letter country code standard 3166 of the international standards organisation (ISO: 3166).

¹²Internet Corporation for Assigned Names and Numbers (ICANN) is a non-profit organisation incorporated in California in US founded in 1998 for managing internet protocol numbers and domain name system root, available at: <http://en.wikipedia.org/wiki/ICANN>.

of the distinctive character and reputation of the marks are considered unfair and detrimental. Courts further held that mere registration and maintenance of domain name leading people to believe that domain name was linked with well-known business would lead to fraud and amounts to passing off.¹³

Since ICANN had opted for cheaper and effective alternative forum there are not many precedents on this issue.

4.1 The UDRP

WIPO introduced best practice for registration authorities and recommended for the introduction of new gTLDs. For accredited domain name registrar, it is compulsory to be bound by arbitration procedure in the UDRP. The dispute policy was decided through WIPO which generally addresses the disputes relating to gTLD under Art. 4 of the UDRP.¹⁴ The policy envisages that a complainant can complain to the provider that:

- i. The registered domain name is identical or confusingly similar to trademark or service mark in which the complainant has right;
- ii. The concerned domain name holder has no right/legitimate interests with respect to the domain name so registered; and
- iii. Such domain name is registered and used in bad faith.

For considering bad faith the following aspects are considered:

- (a) Registration of domain name for selling, renting, assigning to complainant/owner of the trademark or to its competitor for exorbitant consideration.
- (b) Registration aims to prevent a trademark owner from taking corresponding domain name.
- (c) Registration is done for disrupting the business of a competitor.
- (d) Domain name is used for attracting commercial gain and directing internet users to your website/other online location with the aim to confuse the consumers for complainant's mark.

Complainant has to initiate the proceeding by filing a complaint to approved dispute resolution service provider.¹⁵ After payment of fees and document compliance provider will notify the parties about the commencement of proceeding. The respondent has to submit a written response within 20 days to complainant. Panel may hear proceeding as per rules and shall decide as per the law.¹⁶

¹³*Global Projects Management v. Citigroup* [2005] EWHC 2663(ch).

¹⁴The text of UDRP is available at: <http://www.icann.org/udrp/udrp-policy-24oct99.htm/>.

¹⁵Ibid.

¹⁶*Id.*, Para 5, 15(a).

By observing the judicial trends it can be said that registering more than one domain name indicates intention to profit from that name. Failure to develop a website using the name can cost respondent as it is taken as indication of bad faith.

The remedies available are cancellation and/or transfer of registered domain name. While deciding the disputes regarding the domain names the criteria adopted are same as that adopted for resolution of disputes regarding the trademarks. Parallel and alternative deceptive use of the domain attracted transfer of the domains to the original users.¹⁷

The UDRP has not taken away jurisdiction of the courts. It has been proved to be more advantageous as it recognises the rights of unregistered marks.¹⁸ Domain name with geographical words are given protection under UDRP. This feature cannot be claimed under the Trademark Law.¹⁹ Even some of the panellist had awarded more power to trademark owners under UDRP than what trademark law provides.²⁰

There are quite a few domain names bearing the name of famous business houses but they are not registered in its original form. They are expressed in satire, e.g. *Reliance cheats* or *reliance sucks*. These domain names are generally used for criticising the policies or products of famous business houses. Till now the UDRP did not allow such registration under dispute. But it is fair enough to criticise, as it is a part of freedom of speech and expression as envisaged under human rights as well as part of being constitutional guarantees. Recently the panel has allowed the same which implies a change in the attitude towards domain name in satirical form and it marks definitely as a significant development which marches away from traditional support to business concerns.²¹ Such domain names are not registered for any commercial advantage. The traditional pattern of decisions showed that they were considered to be confusing the customers and hence they were implied to be registered in bad faith. Consequently, they were transferred to the complainant. But with this development, the factor of 'bad faith' has been rationalised.

4.2 Critical Issues for UDRP

The nature of UDRP is administrative, yet the WIPO and other scholars have treated it as an arbitral process. The court after analysing the nature of this dispute resolution system concluded that it is merely a contractual arrangement.²² While

¹⁷Supra note 5.

¹⁸Jeanette Winterson v. Mark Hogarth (2000), Case No. D2000-0235, available at: <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0235.html>.

¹⁹WIPO Case No. D2000-5-0505.

²⁰Especially names like geographical names or generic names are not registrable under the trademark law. Use of one's own name or descriptive or satirical use of trade mark is allowed as defenses under trade mark law.

²¹Asda Case, Case No. D2002-0857.

²²Parisi v. Netlearning Inc. (2001) 139 F. Supp. 2d 745 (E.D. Va. 2001).

discussing the nature, the court brought several issues which make it different from the process, e.g. the UDRP rule allows any parties to initiate court proceedings before, during or after the UDRP decision. Whereas, if there is an arbitration agreement, parties cannot initiate litigation process. Further, under UDRP, since the complainants are strangers to registration agreement, they have no obligation to avail UDRP. Arbitration agreement is uncontestedly enforceable but UDRP mandates judicial forum for challenges to UDRP decisions. Lastly, judicial review of the UDRP proceedings is not confined to a motion to vacate which is unlike provisions concerning arbitral awards. Since the trademark owner is not a party to registration agreement which includes UDRP clause, the owner has a choice of forums. Hence it is not surprising that legal forums are preferred. But, it does not give adequate protection to international non-proprietary names.²³

New problems are foreseen for multilingual domain names and the ability to locate websites by use of the keywords rather than URLs.²⁴ Further, it can be observed that there is no right to a series of replies or responses unless the information is specifically requested by the arbitration panel. The registrant can continue to use the domain name during the pendency of the UDRP proceeding. The only remedy available to the complainant is transfer or cancellation of the domain name—there is no right to damages, injunctions or attorneys' fees. The only remedy available to a respondent in the event of loss is to bring a fresh trial in court, as no appeal is available. Panels are given a wide discretion concerning the admissibility of evidence.²⁵

4.3 American Law for Dispute Resolution

As far as America is concerned, from 1995 courts began issuing rulings in favour of trademark holders, on the basis of dilution of a famous trademark under Section 43(c) of the Lanham Act.²⁶

The courts in the US adopted three principles namely:

- i. The trademark infringement involves likelihood of confusion in consumers;
- ii. Concerned domain name diluted the value of the trade mark; and
- iii. Unfair competition.²⁷

²³Report of the Second WIPO internet domain name process, 2001, available at: <http://www.wipo.int/amc/en/processes/process2/>.

²⁴Intellectual Property on the Internet: A Survey of the Issues, available at: http://www.wipo.int/copyright/en/ecommerce/ip_survey/.

²⁵Pankaj Kumar, "An Analysis of Domain Name System And Disputes Involved", available at: <http://www.articlesbase.com/intellectual-property-articles/domain-name-system-and-disputes-involved-1242577.htmls>.

²⁶Minnesota Mining and Mfg. Co. v. Taylor, 21 F. Supp. 2d 1003, 1005 (D. Minn. 1998), Card Service Int'l, Inc. v. Mc Gee, 950 F. Supp. 737, 743 (E.D. Va. 1997), Intermatic, 947 F. Supp. at 1239, 1241.

²⁷The Lanham Act, 15 USC 1114(1), 1125(c), 1125(a), Section 32(1), 43(c), 43 (a).

But it was realised that the traditional principles of trademark were inadequate especially in the case of claims of dilution. Further, it was difficult to prove the mark was famous or well known. To remedy the situation a new clause in the Lanham Act was added.²⁸ The trademark holders have a cause of action against anyone who uses a domain name that is identical to, or confusingly similar to a distinctive trademark, or dilutive of a famous mark, without regard to the goods or services of the parties.²⁹ The legislation outlines indicators of bad faith³⁰ and legitimate use defences.³¹

Following factors are considered to be indicative of bad faith:³²

- i. If there is an intention to divert to a site that could harm the trademark owner's goodwill—either for commercial gain or with intent to tarnish by creating a likelihood of confusion as to its source, sponsorship or affiliation, or endorsement of the site.
- ii. If there is an offer to sell the domain name without having used or having the intention to use it in the bona fide offering of goods or services, or a prior

²⁸The Anti-Cyber Squatting Consumer Protection Act (ACPA), Section 1125(d).

²⁹*Supra* note 27, Section 43(d).

³⁰In determining whether the domain name registrant has a bad faith intent to profit, a court may consider many factors, including nine that are outlined in the statute:

1. The registrant's trademark or other intellectual property rights in the domain name;
2. Whether the domain name contains the registrant's legal or common name;
3. The registrant's prior use of the domain name in connection with the bona fide offering of goods or services;
4. The registrant's bona fide noncommercial or fair use of the mark in a site accessible by the domain name;
5. The registrant's intent to divert customers from the mark owner's online location that could harm the goodwill represented by the mark, for commercial gain or with the intent to tarnish or disparage the mark;
6. The registrant's offer to transfer, sell, or otherwise assign the domain name to the mark owner or a third party for financial gain, without having used the mark in a legitimate site;
7. The registrant's providing misleading false contact information when applying for registration of the domain name;
8. The registrant's registration or acquisition of multiple domain names that are identical or confusingly similar to marks of others; and
9. The extent to which the mark in the domain is distinctive or famous. See 15 U.S.C. §1125(d) (1)(B).

³¹There are four legitimate use defences.

- a. The trademark or other intellectual property rights of the person, if any, in the domain name;
- b. The extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;
- c. The person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services; and
- d. The person's bona fide non-commercial or *fair use* of the mark in a site accessible under the domain name.

See for details <http://www.cybertelecom.org/dns/acpa1.htm#bad>.

³²*Ibid.*

pattern of such conduct. Language in the legislation specifically indicates that this section is not supposed to apply to a party who registers a name with the bona fide intent to launch a new product or company but then abandons that plan and sells the name to a trademark holder.

- iii. There is an intentional provision of misleading contact information in the domain name registration application or the history of such conduct.
- iv. There is a warehousing of multiple domain names known to be identical or confusingly similar to distinctive marks or dilutive of famous marks, without regard to the goods or services of the parties.

Hence the ‘cybersquatters’³³ have been able to avoid liability by not being the one to initiate or offer to sell. Now, courts have decided that mere sitting on such marks is sufficient evidence of bad faith and an offer to sell is not required.

- v. The extent to which a mark under the dispute is distinctive or famous.
The defendant will have the burden of introducing evidence of lawful use. The legislation only provides a defense if there is prior use not simply preparation to use.
- vi. Lawful non-commercial or fair use of the mark in a website under the domain name. Fair use includes comparative advertising, comment, criticism, or parody even where done for profit. However, simply establishing a web site with a fair use, if the actual intent is to sell, will not allow a cybersquatter to avoid a bad faith determination. The more distinctive or famous a mark is, the more likely the Trademark owner will deserve relief. If there is fair use of the domain name then the conclusion of bad faith shall not be drawn.

The Registrar decides the ‘bad faith’ factor in the registration of domain name. This authority to decide is conferred to the executive aiming to save the delay which usually happens with the judicial process. This arrangement is preferred as the e-commerce mandates speedy disposal. But the application of judicial mind and correction of the rationale in the judicious manner is lost as there is no appeal provided in this arrangement.

A phenomenon exactly opposite to the Cybersquatting is Reverse domain name hijacking. Here the trademark owners assert expansive trademark rights in an effort to strip legitimate holders of their domain names. This occurs when big

³³The cyber squatting is a typical phenomenon where the opportunistic persons exploit the loophole in the registration process of the domain name. The desirability of same mark for the domain name is responsible for the disputes as there can be many business houses under the same trademark and the domain names can only be unique. As registration for domain name is on first come first served basis and trade mark owners have no prior right to a domain name incorporating their mark. Hence, there are disputes between trade mark owners and registrants. This opportunity is seized by a number of people who had registered domain names which were famous/well-known trade marks before the concerned business houses could register them. This aimed at either getting profit by selling the same to the concerned business houses or to exploit reputation of well known brands for the promotion of own business. This is popularly called either domain name hijacking or cyber squatting.

corporations intimidate people or companies out of their domain names under the guise of trademark ownership, even though the particular use of a domain name does not constitute trademark infringement, dilution, or unfair competition in any manner.³⁴ As the decision of the registrar is final which does take away provision of appeal, to prevent reverse domain name hijacking, a trademark owner who knowingly misrepresents a domain name to be infringing is made liable to the domain name holder for damages and attorney's fees resulting from cancellation.³⁵

Cyberpirates who include variations on famous trademarks in Internet domain names avoid service of process by providing false and incomplete information in registration materials. Hence the trademark owners are left without an effective remedy as there is a logistical difficulty of identifying cyberpirates and personally serving a multitude of complaints in far-flung jurisdictions. Where there is no jurisdiction over domain name holder or where the domain name holder cannot be found, the trademark owner can file a case *in rem* against the domain name itself.³⁶ The remedy of cancellation and/or transfer of domain name can be claimed.

Unfortunately, even though many cases are decided against the cybersquatters still the offences are not under hold. The first reason is that the culprits do not disclose their true identity and location;³⁷ Secondly, the registration process is completely automated, it facilitates the anonymity; Thirdly, many registrants provide fraudulent or fictitious names and/or addresses to save themselves from prosecution and civil liability; Fourthly, so called registrants create corporations in another country to register domain names; and Fifthly some opt for modus operandi to assign their domain names to unidentifiable entities after registering them.³⁸ In *Porsche Cars North America, Inc. and Dr. Ing. H.C.F. Porsche AG*³⁹ there were several domain name variants challenged by the plaintiff which were registered in Honduras and sold to a party in Iran directed unwary net surfers to web sites that offered thousands of hardcore pornographic videos, live sex, and other materials. The matter involved problem of jurisdiction. The district court allowed issuance of process through email to the concerned sites instead of *In personam* issue of process to the registrants. The court held that as the Trademark Dilution Act, 1995 does not provide for *in rem* proceedings.

Under the traditional terminology, a true *in rem* action is one in which the plaintiff asks the court to determine all claims against anyone, regardless of he being a party or not relating to the property or thing in question. The effect of a true

³⁴ Available at: <http://definitions.uslegal.com/r/reverse-domain-name-hijacking/>.

³⁵ Anti-Cybersquatting Piracy Act (ACPA), Lanham Act, Section 43(d), 15 U.S.C. S. 1125(d), available at: <http://cyber.law.harvard.edu/property00/domain/legislation.html>.

³⁶ Thomas R. Lee, "In Re m Jurisdiction In Cyberspace", 75 Wash. L. Rev., 2000 at 97.

³⁷ World Intellectual Property Org., Final Report of the WIPO Internet Domain Name Process, 1999 at 131, available at: http://ecommerce.wipo.int/domains/process/eng/final_report.html.

³⁸Ibid.

³⁹*Porsche Cars N. Am., Inc. v. PORSCH.COM* 51 F. Supp. 2d 707 (E.D. Va. 1999) (No. Civ. A. 99-0006-A).

in rem judgment is to establish title to the property in question and to foreclose any future claims to it. Quasi *in rem* actions are of two types. Type I quasi *in rem* actions are those where the plaintiff asserts an interest in the property as against specifically identified individuals and the judgment affects the rights of those individuals, not the claims of “all the world”. Type II quasi *in rem* actions, by contrast, do not involve pre-existing interests in or claims to the property at all. Instead, the plaintiff in a type II action seeks to establish an interest in the defendant’s property as a basis for exercising jurisdiction over the defendant when *in personam* jurisdiction is unavailable. Eventually, the U.S. Supreme Court determined that the “fictive” adjustments that it had made to the law of territorial jurisdiction were inadequate. Due process requires that in order to subject a defendant to a judgment *in personam*, if he is not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice”.⁴⁰ Under the minimum-contacts test that has developed since *International Shoe*,⁴¹ a court may exercise jurisdiction over a defendant not served within the forum State so long as the defendant has “purposefully availed himself of the privilege of conducting activities within the forum State”, such that the defendant “should reasonably anticipate being hauled into court there”. The Court has also recognised a distinction between “specific” and “general” jurisdiction, holding that even “isolated and sporadic” contacts may be sufficient to sustain jurisdiction where the plaintiff’s claim arises out of such contacts.⁴² Finally, the Court has indicated that the extent of the contacts necessary to satisfy due process may vary depending on considerations such as the convenience of the forum for resolution of the parties’ dispute and the Forum State’s interest in protecting its citizens.⁴³ The traditional mechanism of an *in rem* proceeding seems well suited to the problem of trademark cyberpiracy. Under the Civil Asset Forfeiture Reform Act, 1994⁴⁴ it has been clearly interpreted by the courts that the disputes attracting foreign claim do not require further authorisation. But this remedy is inadequate for getting money damages. The cybersquatters cannot be brought within *in rem* jurisdiction effectively as the courts have not interpreted the Civil Asset Forfeiture Reform Act provisions into Langham Act as seen in *Porshe case*. It led to the enactment of the Anti-cyber squatting Consumer Protection Act.⁴⁵ The enacted provisions amended the Lanham Act to clarify that the owner of a trademark may

⁴⁰*Pennoyer v. Neff*, 95 U.S. 714, 727 (1877).

⁴¹*International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁴²*Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984).

⁴³*Ibid.*

⁴⁴The Civil Asset Forfeiture Reform Act; 28 U.S.C. 1655 (1994).

⁴⁵Pub. L. No. 106-113, 113 Stat. 1501 (1999).

assert a claim for trademark infringement or dilution against a cybersquatter and expressly provided in *rem* jurisdiction.⁴⁶ *In rem* provision attempts to respond to the problems faced by trademark holders in attempting to effect personal service of process on cyberpirates.⁴⁷ Specifically, there has been concern that cyberpirates often register domain names under false names and addresses and often either refuse to acknowledge the legitimate demands of a trademark holder to stop using an infringing domain name, or simply respond to an initial demand and then ignore later efforts to secure compliance of the cyberpirates.⁴⁸ If the domain-name registration is held by such an entity, the property itself is also within the forum State, as the entity that holds it may be subject to an order resolving competing interests in the property. Further, registering agency expressly agrees in its domain-name dispute policy that upon the filing of a civil action related to the registration and use of the domain name, it will “deposit control of the domain name into the registry of the court”, and that it will “abide by those provisions of temporary or final court orders directing the disposition of the domain name⁴⁹ there can be fair resolution of the disputes”. It is pertinent to note that the Domain Name Server (DNS) is hierarchical. When an Internet surfer attempts to contact a web site associated with a certain domain name he submits the name through his Internet Service Provider (ISP) the bottom rung of the DNS hierarchy. ISPs, in turn, depend on the information in databases maintained in any of a number of root servers operated by various governmental, educational, and business entities. By updating the various other root servers on a daily basis, the root server ensures that registration authority retains control over the function and value of an assigned domain name.⁵⁰

⁴⁶The statute reads: The owner of a mark may file an *in rem* civil action against a domain name in the judicial district in which the domain name registrar is located if-(1) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office; and (2) the court finds that the owner-(I) is not able to obtain *in personam* jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or(II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by-(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and (bb) publishing notice of the action as the court may direct promptly after filing the action. Pub. L. No. 106-113, § 3002, 113 Stat. 1501, 1537 (1999).

⁴⁷H.R. Rep. No. 106-464 (1999).

⁴⁸Ibid.

⁴⁹See Network Solutions, Inc., NSI Domain Name Dispute Policy, pp. 1–2, available at: <http://www.networksolutions.com/legal/dispute-policy.html>.

⁵⁰63 Fed. Reg. at 31, 742.

5 Indian Policy

India has a top-level domain (TLD) (.in) as listed in the ISO Standards. The second level sub-domains registered under the (.in) domain are (.ernet), (.nic), (.net), (.res), (.ac), (.co), (.gov), (.mil) and (.org). For gTLD, the consumers have to rely on UDRP.

As far as Indian policy (INDRP) is concerned⁵¹ initially the applicant for registration has to ensure that true and correct address is given, domain name does not infringe rights of third party, registration is not for unlawful purpose and the Registrant will not knowingly use the domain name in violation of any applicable laws or regulations. The policy determines the disputes which may relate to the fact that (i) domain name is identical or confusingly similar to a name; trademark or service mark; (ii) the Registrant has no rights or legitimate interests for concerned domain name; and (iii) domain name has been registered or is being used in bad faith.

The registrar will decide the bad faith involved in registering the domain name on following considerations:

- a. Where the Registrant has registered or acquired the domain name for selling, renting, or otherwise transferring the domain name to the owner of the trademark or to a competitor of that complainant for consideration.⁵²
- b. The Registrant has registered the domain name for preventing the owner of the trademark from reflecting the mark in a corresponding domain name.⁵³
- c. By using disputed domain name, the Registrant has intentionally attempted to attract Internet users to the Registrant's website or other online location, by creating a likelihood of confusion with the Complainant's name or mark as to the source, sponsorship, affiliation, or endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.⁵⁴

The remedies include cancellation of the Registrant's domain name or the transfer of the Registrant's domain name registration to the Complainant.⁵⁵

⁵¹In. Domain Name Dispute Resolution Policy, 2005, [https://www.registry.in/.IN%20Domain%20Name%20Dispute%20Resolution%20Policy%20\(INDRP\).](https://www.registry.in/.IN%20Domain%20Name%20Dispute%20Resolution%20Policy%20(INDRP).)

⁵²*Id.*, Section 6(i).

⁵³*Id.*, Section 6(ii).

⁵⁴*Id.*, Section 6(iii).

⁵⁵*Id.*, Section 10.

5.1 Judicial Approach

The Indian judiciary has recognised and protected the domain name by equating the same to a trademark and adopted the action of passing off.⁵⁶ The court accepted that the Internet domain names are of importance and can be a valuable corporate asset. A domain name is more than an Internet Addresses and is entitled to the equal protection as trade mark.⁵⁷ The court recognised that there was no express law which prohibited such booking and selling of domain name.⁵⁸ The courts not only recognised the factum of cybersquatting but also prohibited the same. The same was done on the basis of trademarks law. The court pointed out that the Registering Authority has no mechanism to inquire and decide whether the domain name sought to be registered is in prior existence and belongs to another person. The court took help of UDRP for deciding the factors namely “identical or is confusingly similar to a trade mark”, and “registered and is being used in bad faith”. It also referred to dilution principle which existed in American law.⁵⁹ In the first case before Supreme Court namely *Satyam Infoway Ltd. v. M/s. Si fynet Solutions Pvt. Ltd*⁶⁰ even the court though based its decision on the Trade Mark Act and action of passing off, it emphasised on the need for a national legislation regarding the domain name by specifying that:

...since the internet allows for access without any geographical limitation, a domain name is potentially accessible irrespective of the geographical location of the consumers. The outcome of this potential for universal connectivity is not only that a domain name would require worldwide exclusivity but also that national laws might be inadequate to effectively protect a domain name. In India, there is no legislation which explicitly refers to dispute resolution in connection with domain names. Although the operation of the Trade Marks Act, 1999 itself is not extra territorial and may not allow for adequate protection of domain names, this does not mean that domain names are not to be legally protected to the extent possible under the laws relating to passing off.

Court specified that domain names are subject to the same legal norms applicable to other intellectual properties such as trademarks. The Court further held:

The use of the same or similar domain name may lead to a diversion of users which could result from such users mistakenly accessing one domain name instead of another. This may occur in e-commerce with its rapid progress and instant (and theoretically limitless) accessibility to users and potential customers and particularly so in areas of specific overlap. Ordinary consumers/users seeking to locate the functions available under one domain name may be confused if they accidentally arrived at a different but similar website which offers no such services. Such users could well conclude that the first domain name

⁵⁶Yahoo!, Inc. v. Akash Arora & Anr 78 (1999) DLT 285, relied upon the ratio of *Marks & Spencer v. One-in-a-Million* (1998) FSR 265.

⁵⁷Rediff Communication Limited v. Cyberbooth AIR 2000 Bom. 27.

⁵⁸Manish Vij and v. Indra Chugh AIR 2002 Del. 243 at para 25.

⁵⁹Acqua Minerals Ltd.v. Pramod Borse AIR 2001 Del. 463.

⁶⁰AIR 2004 SC 3540.

owner had misrepresented its goods and services through its promotional activities and the first domain owner would thereby lose their custom.

As such, the court concluded that a domain name may have all the characteristics of a trademark and could lead to an action for passing off.

6 Need for the Legislation

Since the judiciary has to do a lot of interpretation and borrow the concepts from the foreign legislations and case law, it has become incumbent on the Indian legislature to enact a law. The concept of domain name will be recognised as property and rights and duties will be clearly specified. As India enters into global market and customers are opting for online purchasing and access of merchandise through internet banking, in coming days unless there is an action taken by the government, many customers will suffer losses and commerce will be at jeopardy. The use of trademark law for the concept of domain name has not proved sufficient. As sale of popular domain names is proving to be a very profitable business, the cyber-squatting and other domain related offences are bound to be experienced by Indian commerce. It would be wiser to learn from global trends and be prepared for the consequences.

Chapter 34

Legal Framework of Information Technology in India: With Special Reference to Cyber Obscenity

Golak Prasad Sahoo

1 Introduction

The dawn of the third millennium imbuing the spirit of techno-scientific culture witnesses an exponential acceleration of information revolution after the agricultural and industrial revolutions. The unprecedented growth of information revolution has excelled tremendous opportunities and advantages in the fields of banking,¹ business,²

¹Computerization in banks improves the customers' satisfaction as well as the employees' satisfaction. The normal bank timing can become practically round the clock. When all nationalized banks will be computerized and networked, customer can transact from any branch. The advantages of dematerialization, rematerialization, smart card (plastic money), circular notes, electronic cheques, truncated cheques, and convertibility of money, core banking system, automated teller machine and digital signature have already brought the concept of 24 h banking time in major cities, which gradually will be extended to all people.

²The use of the Internet provides a global infrastructure to support commerce. Today, e-commerce is a buzzword. E-commerce is defined as the application of information technology to support business processes and exchange of goods, services or information between suppliers and customer. The e-catalog along with valuation can be made available in enterpriser's homepage for customer search. Like conventional settlement of payment, credit card payment gets physically transferred from buyer to the seller.

entertainment,³ education,⁴ governance,⁵ agriculture⁶ and justice delivery system.⁷ Therefore, information technology is being considered today as the life-blood of the society. Furthermore, the ingenious mind of human beings has invented the cyborg⁸ world where there is no pain, there is no disease, and there is no starvation and no

³The concept of virtual reality is widely used in entertainment. Movie on demand will change concept of current day television broadcasting. Today robots are available in the net to replace the physical toys.

⁴The web based education system is quite popular among the students, which is an outcome of advancement in multimedia technology. This leads to instruction-on-demand and helps the students to study during when he is on move or desires to study in free time. Online examinations and online interviews set to enter in a big way.

⁵E-Governance (or Digital Governance) is defined as the utilization of the Internet and the *worldwide-web* for delivering governments' information and services to the citizens.

- (a) Project *saukaryam* of Visakhapatnam Municipal Corporation is a public private partnership model of e-governance. Through the website: www.saukarya.org facilities like online payment of municipal dues, filing and settlement of complaints and grievances, tracking of building plans status, registration of death and birth, tracking garbage lifting, etc.
- (b) *Gyandoot model* in the Dhar District of Madhya Pradesh, a low cost, self sustainable and community owned rural Intranet project provides soochanay as (information Kiosks) to rural population like agriculture produce auction centers, copies of land record, online registration of applications and public grievance redressal.
- (c) The State of Kerala has initiated a *Smart Ration Card Project* to streamline the ration card purchasing.
- (d) The State of Haryana is implementing *Haryana Registration Information system* to provide registration of documents, right at the Tehsil/sub level. It includes security checks, online capturing and storing of photos of buyers, sellers and witnesses and information about registration fees, printing of registration certificate and various statistical reports.
- (e) *Bhoomi Project* of the State of Karnatak involves the computerization of 225 treasuries all across the State. The Bhoomi project is about computerization of land record system and its already operational in 176 talukas.
- (f) *E-choupal* is Information Technology Communication's based rural project. It enables farmers to readily access crop specific real time information and customized knowledge in their native language. It has bagged the United Nations' Development Programme's first global business award to recognize the role of the corporate community in implementation of UN targets of reducing poverty, etc. VakulSaharma, *Information Technology Law and Practice*, Universal Law Publishing Co. (2000), at 40.

⁶Application of digital technology is also quite useful in the field of agriculture. Onsite field measurements, data analysis, farm management and control are realizable. The increase in food production is achieved through better and effective utilization of available resources. Microprocessor based systems help in better management of fertilizer performance measurement through soil electronics. IT based techniques are best suited for irrigation scheduling and scientific water management. And also, IT based techniques are best suited for irrigation.

⁷Electronic court filing is the automated transmission of legal documents from an attorney, party or self represent litigant to a court, from a court to an attorney, and from an attorney or other user of legal documents.

⁸The term *cyborg* is used to refer to a man or woman with bionic or robotic implants.

death, only better economy, better production and better life. Thus, we are said to be in the midst of a new industrial revolution that will lead us into a new kind of society—an information society.

It is the rule of the nature that like other technologies, rapid expansion vistas of information revolution has also emerged as the boon as well as the boom for the society. New technologies not only create material progress and human welfare but they are being used in an unrestricted way causing serious risks and actual damages both to nature and human beings. Unless, there is a concrete step to make the Internet a safer and more reliable environment through the discipline and control of law, it might, like Frankenstein monster, destroy its very creator, the man. The true progress of society is a healthy relationship between law on one side and science and technology on the other.⁹ When law is confronted with technology, the important function of it is to resolve the problems posed by facts keeping space for stability, predictability and continuity and the realities of life.

2 Origin and Development of the Internet

The origin of the Internet can be traced to the development of a network by the Advanced Research Project Agency Network (ARPANET) sponsored by the US military department in 1960. The idea was that in case any part of the country was destroyed by the nuclear confrontations, the ARPANET's technology would make communications system functional by introducing into different routers to their destinations. In 1969, that development got under a significant change when ARPANET linked together a handful of four universities.¹⁰ In 1970, further innovations appeared such as electronic mail application which expanded the possibilities for communication. A major impetus for the emergence of the Internet as we now know it was given when in 1990 the US authorities released the ARPANET to civilian control under the auspices of the National Science Foundation Day. Moreover, same year saw another development of a web browser by researchers at the CERN physics laboratory in Switzerland dubbed as *World Wide Web* allowing more sophisticated forms of information exchange such as the sharing of images as well as text. For the first time, the commercial browser, Netscape was launched in 1994. The commercialization and democratization of the Internet happened in mid-1990s; India accessed the Internet connection in 1995.

⁹Justice H.R. Khanna, "Interaction of Science, Technology and Law in India", 15(1&2) *The Banaras Law Journal*, 1979, at 1.

¹⁰University of California at Los Angeles, University of California at Santa Barbara, Stanford Research Institute and the University of Utah.

3 Evolution of Information Technology Law

The Indian Parliament capturing the philosophy of Model Law¹¹ has enacted the Information and Technology Act, 2000 and its (Amendment) Act, 2008. The Act not only transforms the Model law of the United Nations Commission for International Trade Law into domestic legislation but also endeavors to evolve a procedural infrastructure seeking to regulate the electronic commerce effectively and comprehensively and provides answer to the legal issues that have cropped up because of the emergence of techno-scientific culture.

The prime object of the said Act is to accord the legal recognition to e-record generated by the computer, computer system and the Internet. The Act has, therefore, been designed to give birth to functional equivalence approach¹² which provides legal recognition to the electronic counterparts of notions such as writing, signature and document. The idea behind the Act is to remove the obstacles arising because of traditional paper based documentation and to create a more congenial and more secure legal environment for electronic commerce and encompass computer based techniques that are able to carry out the similar functions. To bring a new paradigm shift from paper based world to paperless world, it amends existing laws in Indian Penal Code, 1860,¹³ the Indian Evidence Act, 1872,¹⁴ Banker's Book Evidence Act, 1891,¹⁵ and the Reserve Bank of India Act, 1934¹⁶ so as to bring these laws in line with the new Information Technology law. The object is to afford equal treatment to users of electronic communication with those using conventional forms of communication.

¹¹The United Nations Commission on International Trade Law (UNCITRAL) drafted a Model Law in 1996 that provides answers to many of the legal issues that have occupied significant place in the computer world. It undertook to formulate the model legislation in response to the fact that in a number of countries the existing legislation governing communication and storage information is inadequate or outdated because it does not contemplate the use of electronic commerce. Although it does not have any force yet it serves as a model to countries for evaluation and modernization of certain aspects of their law. India is also signatory to it and hence is under obligation to redesign and modernize its law in the light of information technology and communication revolution which has its consequent multidimensional impact on different aspects of the life of the people world wide.

¹²According to the doctrine of functional equivalence principle whatever laws are applicable to the human conduct in the physical world (off-line conduct) should also apply to human conduct in cyberspace (online conduct).

¹³The Indian Penal Code, 1860, sections 29A, 167, 172, 173, 175, 192, 104, 463, 464, 468, 469, 470, 471, 474, 476, 477 and 477A.

¹⁴The Indian Evidence Act, 1872, sections 3, 17, 22A, 34, 35, 39, 47, 59, 65, 65B, 73A, 81A, 85A, 85B, 85C, 88A, 90 and 131.

¹⁵The Bankers' Book Evidence Act, 1891, sections 2 and 2A.

¹⁶The Reserve Bank of India Act, 1934, section 58.

4 Cyber Offences

The excellence of the Information Technology Act provides that any person may be held liable to pay damages by way of penalties and compensation to the aggrieved person if he, without permission of the owner or any other person who is in charge of the computer, computer system or computer network accesses or secures access to such computer, computer system or computer network¹⁷ (or computer resource),¹⁸ or downloads,¹⁹ copies²⁰ or extracts²¹ any data, computer data base, or information from such computer, computer system, or computer network including information or data held or stored in any removable storage medium;²² introduces or causes to be introduced any computer contaminants or computer virus into any computer, computer system or computer network²³; damages or causes to be damaged any computer, computer system or computer network, data, computer data base or any other programmes residing in such computer, computer system or computer network²⁴; disrupts or causes disruption of any computer, computer system or computer network²⁵, denies or causes the denial of access to any person authorized to access any computer, computer system or computer network by any means²⁶; provides any assistance to any person to facilitate access to a computer, computer system or computer network in contravention of the provisions of this Act, rules or regulations made there under²⁷; charges the services availed of by a person to the account of another person by tampering with or manipulating any computer, computer system, or computer network²⁸; destroys, deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means²⁹; and steals, conceals, destroys or alters or causes any person to steal, conceal, destroy or alter any computer source code used

¹⁷The Information Technology Act, 2000, section 43(a).

¹⁸*Id.*, section 2(k) Computer resource means computer, computer system, computer network, data, computer database or software.

¹⁹Retrieving a file (digital content) from a remote computer, computer system or computer network.

²⁰Retrieving a file (digital content) from a remote computer, computer system or computer network and then saving it on either computer's hard disk or any removable storage medium.

²¹Retrieving a file (digital content) from a remote computer, computer system or computer network and then selectively extract part of the digital content.

²²The Information Technology Act, 2000, section 43(b).

²³*Id.*, section 43(c).

²⁴*Id.*, section 43(d).

²⁵*Id.*, section 43(e).

²⁶*Id.*, section 43(f).

²⁷*Id.*, section 43(g).

²⁸*Id.*, section 43(h).

²⁹The Information Technology (Amendment) Act, 2008, section 43(i).

for a computer resource with an intention to cause damage.³⁰ The Act further lays down that a person shall be liable to a penalty if he fails to protect data³¹; furnish any information, return,³² etc., or fails to file return or furnish the same within the specified time or stipulated in the regulation, or fail to maintain books of accounts or records required under this Act or rules or regulation made thereunder.

The Act has empowered the Central Government to appoint an adjudicating officer³³ for holding an inquiry whether any person has committed a contravention of any of the provisions of the Act or of any rule. It is clothed with the powers of a civil court and all proceedings before it shall be deemed to be judicial proceedings. It has been stipulated as a matter of guidance that while deciding the quantum of compensation the adjudicating authority shall have due regard to the factors, namely amount of gain of unfair advantage, wherever, quantifiable made as a result of the default; the amount of the loss caused to any person as a result of fault; and the repetitive nature of the default.³⁴

The Act also provides for the establishment of Cyber Appellate Tribunal³⁵ to hear appeals of a person aggrieved by an order made by Controller³⁶ or Adjudicating Officer. The jurisdiction of civil court to entertain any suit or proceeding in respect of any matter which an adjudicating officer appointed or the Cyber Appellate Tribunal constituted under this Act is expressly barred and no civil court or any other authority can grant injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.³⁷ Moreover, the decision or order of the Cyber Appellate Tribunal is subjected to an appeal to the High Court.³⁸ Significantly, it is said that Adjudicating Officer and Cyber Appellate Tribunal shall be required to be guided by principles laid down in the Civil Procedure Code, 1909 in order to achieve the natural justice.³⁹

The Act proposes to promote a secure digital environment by incorporating provisions of cyber offences as tampering of computer source code,⁴⁰ computer related offences,⁴¹ sending offensive messages through communication service,⁴² dishonestly receiving stolen computer resource or communication device,⁴³ identity

³⁰*Id.*, section 43(j).

³¹*Id.*, section 43A.

³²The Information Technology Act, *supra* note 22, section 44.

³³*Id.*, section 46.

³⁴*Id.*, section 41.

³⁵*Id.*, section 48.

³⁶*Id.*, sections 17 and 28.

³⁷*Id.*, section 61.

³⁸*Id.*, section 62.

³⁹*Id.*, section 58.

⁴⁰*Id.*, section 65.

⁴¹*Id.*, section 66.

⁴²The Information Technology (Amendment) Act, *supra* note 29, section 61A.

⁴³*Id.*, section 66B.

theft,⁴⁴ cheating by impersonation using computer resource,⁴⁵ violation of privacy,⁴⁶ Cyber terrorism,⁴⁷ publishing, or transmitting obscene material in the electronic form which is lascivious or which appeals to the prurient interest,⁴⁸ publishing or transmitting of material containing sexually explicit act,⁴⁹ publishing or transmitting of material depicting children sexually explicit,⁵⁰ failure to preserve and retain the information by intermediaries,⁵¹ failure to comply with the instructions of the Controller of Certifying Authorities,⁵² failure to intercept or decrypt information if the same is necessary for the interest of the sovereignty or integrity of India, the security of the State, friendly relations with foreign State, public order or for preventing incitement to the commission of the any cognizable offence,⁵³ power to issue directions for blocking for public access of any information through any computer resource,⁵⁴ power to authorize to monitor and collect traffic data or information through any computer resource for cyber security,⁵⁵ securing access or attempting to secure access to Critical Information Infrastructure,⁵⁶ misrepresentation while obtaining any license to act as a certifying authority or a Digital Signature Certificate⁵⁷ and breach of confidentiality and privacy in respect of e-record,⁵⁸ disclosure of information in breach of lawful contract,⁵⁹ publication of Digital (electronic) Signature Certificates which are false in certain particulars,⁶⁰ publication of Digital (Electronic) Signature Certificates for fraudulent purpose.⁶¹

⁴⁴*Id.*, section 66C.

⁴⁵*Id.*, section 66D.

⁴⁶*Id.*, section 66E.

⁴⁷*Id.*, section 66F.

⁴⁸*Id.*, section 67.

⁴⁹*Id.*, section 67A.

⁵⁰*Id.*, section 67B.

⁵¹*Id.*, section 67C.

⁵²*Id.*, section 68.

⁵³*Id.*, section 69.

⁵⁴*Id.*, section 69A.

⁵⁵*Id.*, section 69B.

⁵⁶*Id.*, section 70.

⁵⁷*Id.*, section 71.

⁵⁸*Id.*, section 72.

⁵⁹*Id.*, section 72A.

⁶⁰*Id.*, section 73.

⁶¹*Id.*, section 74.

5 Cyber Obscenity

From the prehistoric age, sex has been considered as an inspiring source for development of human beings. It is being intractable and multidimensional concept that has generated immense deliberation, discussion and discourse during each succeeding period of history in all civilized nations because much obsession for sex results into the idea of aggravated form of pornography⁶² which has the potential to destroy the modesty or morality laid down in the society. It is always a difficult task to specify as to what is moral and what is contrary to it. What may be unaesthetic in particular situation may not be same in a different situation. Furthermore, during the last two decades, the uncontrolled and unbridled expansion of information communication revolution has produced pornographic material through printing press, video, satellite television, the internet, pornography websites, blue film and porn-magazine. The existence of the cyberspace⁶³ and its exponential growth has made it very easy to create, distribute and traffic pornographic materials including indecent exposure of child pornography.

In cyber world, the problems are multiplied like pornographic materials may be uploaded in one country, criminals are in another country and consequences are felt in a third country. The result is that the different sovereignties, jurisdictions, laws and rules will come into play. Thus, it goes without saying that any national legal response will have only limited implications in combating this transnational menace

⁶²The term pornography is derived from the Greek Words- *porne* (prostitute) and *graphos* (writing). The word now means: (1) description of prostitutes or prostitution: (2) a depiction (as in writing or painting of licentiousness or lewdness): a portrayal of erotic behavior designed to cause sexual excitement. *The Encyclopedia of Ethics* defines it as the sexual explicit depiction of person, in words or images, created with the primary, proximate aim and reasonable hope of eliciting significant sexual arousal on the part of the consumer of such material. *The Canadian Dictionary* of English Language defines it as sexually explicit material that sometimes equates sex with power and violence. According to *Webster's New World Dictionary*, it means writings, pictures, etc., intended primarily to arouse sexual desire.

⁶³The word cyber space is coined by an author William Gibson in his novel *Neuromancer*, *Monalisa* and *Count Zero* written in 1980. Novelist Gibson visualized the cyber space in these words as "A consensual hallucination experienced daily by billions of legitimate operators, in every nation by children being taught mathematical concepts. A graphical representation of data abstracted from the banks of every computer in the human system unthinkable complexity, lines of light ranged in the non-space of the mind, cluster and constellations of data". New York: Berkley Publishing Group, 1989, p. 128. The Supreme Court of the United States of America in *ACLU v. Reno*, 521 US 844, explains the nature of cyber space as follows: anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categories precisely. But, as presently constituted, those most relevant to thee cases are electronic mail (e-mail), automatic mailing list services, newsgroup, a chat room and the *World Wide Web*. All of these methods can be used to transmit text most can transmit sound, picture, and moving video images. Taken together, these tools constitute a unique medium known to its user as cyber space-located in no particular geographical location but available to anyone any in the world with access to the Internet.

of cyber obscenity because it is difficult to determine the country in which the crime was committed. Further, the issue tends to raise many thorny questions viz. who should have jurisdiction to prescribe rules of conduct or adjudication? How will search and seizure of systems located in another country be carried out? How will a country obtain presence of an offender who is citizen of another country in transnational organized cyber crimes? Therefore, the new transient medium that the cyberspace puts the draftsmen in despair makes the legislature start lamenting and magistrates become handicapped.

5.1 Teleological Development and Obscenity

Before addressing the jurisprudence of cyber obscenity, the quintessential question remains as to here what is the scope and scale of terrestrial obscenity⁶⁴ and its history. The expression obscenity may be understood in its widest possible amplitude because there is no consistent, coherent and concurrent definition like ‘acid test’ formula at the national, international and global levels. Although there are many definitional metaphors surrounding the issues of obscenity and pornography, the former which is typically subjected to formal legal prohibition and sanction while later may attract more informal condemnation as variously unhealthy, filthy dirty, immoral, unsavory or deviant behavior. Thus, the prime question which crops before the legal community is which kind of prevalent pornography is the threshold of obscenity. The test of obscenity being a cross-cultural variation firstly it was laid down by Cockburn, CJ in *Regina versus*

⁶⁴The term obscenity, a moving and elusive concept is derived from the Latin phrase *ob caenum* meaning about filth. It denotes the quality of the material identified as being offensive to modesty or decency. In *R. v. Close*, (1948) V.L.R. 445, at 465, Justice Fullagar wrote, “There does not exist in any community at all times-however the standard may vary from time to time-a general instinctive sense of what is decent and what is indecence of what is clean and what dirty and then this distinction has to be drawn. I do not know that today there is any better tribunal than a jury to draw it-I am very far from attempting to lay down a model direction, but a judge might perhaps, in case of a novel, say something like this. It would not to be true to say that any publication dealing with sexual relation is obscene. The relations of the sexes are of course, legitimate matters for discussion everywhere. There are certain standard of decency which prevail in the community, and you are really called upon to try this case because you are regarded as representing and capable of justly applying those standards what is obscene is something which offends against those standards.”

*Hicklin*⁶⁵ that it is the tendency to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort may fall. Furthermore, Justice Cockburn explained that the danger of prurient literature was that it would suggest to the young minds and even to persons of more advance age, thoughts of most impure and libidinous character.

Thereafter, in *Roth versus United States*,⁶⁶ the United States Supreme Court tendered a basic redefinition of obscenity stating that whether to the average person applying community standard the dominant theme of material as a whole appeals to prurient interest.

In *Marvin Millar versus State of California*,⁶⁷ the basic guidelines for the trier of fact evolved:

- (a) Whether the average person, applying contemporary community standards, would find that the work, taken as a whole appeals to the prurient interest;
- (b) Whether the work depicts or describes, in a patently offensive way,⁶⁸ sexual conduct specifically defined by applicable state law; and

⁶⁵(1868) LR 3 QB 360, 371; the facts involve one Henry Scott, who resold copies of an anti-catholic pamphlet entitled '*The Confessional Unmasked: Shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession*'. The pamphlet consisted of extracts taken from the writings theologians on the doctrine and discipline of the *Romish* Church and particularly on the practice of auricular confession. On one side of the pages were passages in the originals Latin, and opposite to each passage was a free translation in English. The Pamphlet also contained a preface and notes condemnatory of the tenets and principles of the writers. About half of the pamphlets relate to the controversial questions but the latter half of the pamphlet was grossly obscene, as relating to impure and filthy acts, words and ideas. The pamphlets were ordered to be destroyed as obscene, Scott appealed against the order to the court of *Quarter Sessions*, Benjamin Hickline, the official in charge of such orders as Recorder, revoked the order of destruction. Hicklin held that Henry Scott's purpose had not been to corrupt public morals but to expose problems within the Catholic Church: hence, Scott's intention was innocent. The authorities appealed *Hicklin*'s reversal, brining the case to the consideration of the Court of Queen Bench.

⁶⁶(1957) 354 US 476.

⁶⁷(1973) 25 US 413, the appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called 'adult' material. After a jury trial, he was convicted of violating California Penal Code S. 311.2, misdemeanor, by knowingly distributing obscene matter, and the Appellant Department, Superior Court of California, County Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelop addressed to restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures: they complained to the police. The brochures advertise four books entitled '*Intercourse*', '*Man-woman*', '*Sexorgies illustrated*' and a film entitled '*History of Pornography*' and a film entitled '*Marital Intercourse*'. While the brochures contain some descriptive printed material, primarily they consistent of pictures and drawing very explicitly depicting man and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

⁶⁸Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

- (c) Whether the work taken as a whole lacks serious literary, artistic, political or scientific value or utterly without redeeming social value.

In India, the word obscene has neither been defined in Indian Penal Code, 1860⁶⁹ and the Indecent Representation of Women (Prohibition) Act, 1986⁷⁰ nor has it been defined in the Information Technology Act, 2000 and

⁶⁹The original Indian Penal Code, 1860, sections 292 and 293 dealt with sale of obscene books, etc., and obscene objects to young persons, it was accordance with the resolution passed by the International Convention on the suppression and circulation and Traffic in Obscene Publications, signed at Geneva on behalf of the Governor General in Council on 12th day of September 1923. The Select Committee in its report dated 10th February, 1925 intended to exclude religious, artistic and scientific writing, etc., and subsequently, this section makes exception in respect of any representation sculptured, engraved or painted on or in any ancient monument. Furthermore, section 293 provides for enhancement of punishment to those who sell, distribute, exhibit or circulate any obscene object to person under the age of 20 years. Section 294 provides that whoever, to the annoyance of others (a) does any obscene act in public place or (b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine or with both.

⁷⁰The object of the Act was to prevent the depiction of the figure of a woman in a manner which is derogatory or denigrating to a woman or which is likely to corrupt public morality. ‘Indecent representation of women’ has been defined in the Act to mean the depiction in any manner of the figure of a woman, her form or body or any part thereof in such a way as to have the effect of being indecent, or derogatory to, or denigrating to women, or is likely to deprave, corrupt or injure the public morality or morals. And also section 3 of the Act lays down that no person shall publish or cause to be published, or arrange to take part in the publication or exhibition of any advertisement which contains indecent representation of women in any form. Section 4 further lays down that no person shall produce or cause to be produced, sell, let or hire, distribute, photograph representation of figure which contains indecent representation of women in any form. But this prohibition does not apply to:

- (a) any book, pamphlet, paper slide, film, writing, drawing, paintings photograph, representation on figure:
 - (i) the publication of which proved to be justified as being for the public good on the ground that such book, pamphlet, paper, slide, film, writing drawing, painting, photograph, representation or figure is the interest of science, literature, art or learning or other objects of general concern: or
 - (ii) which is kept or used *bona fide* or religious purposes:
- (b) any representation sculptured, engraved, painted or otherwise represented on or in:
 - (i) any ancient monument within the meaning of the “*Ancient Monuments And Archaeological Sites and Remains Act, 1958*”: or
 - (ii) any temple, or any car used for the conveyance of idols, or kept or used for any religious purpose:
- (c) any film in respect of which the provisions of Part II of the Cinematography Act, 1952 will be applicable.

(Amendment) Act, 2008.⁷¹ It is the duty of court to consider the obscene matter by taking an overall view of the entire work and to determine whether the obscene passages are so likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall and in doing so one must not overlook the influence of the book on the social morality of our contemporary society.⁷²

In *Ranjit D. Udeshi versus State of Maharashtra*,⁷³ the Supreme Court observed that the test of obscenity to be adopted in India is that obscenity without a pre-ponderating social purpose or profit cannot have the constitutional protection of free speech and expression and obscenity is treating sex in a manner appealing to the carnal side of human nature or having that tendency. The obscene matter in a book⁷⁴ must be considered by itself and separately to find out whether it is so grossly and it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book is likely to fall. In this connection, the interests of our contemporary society and particularly the influence of the book on it must not be overlooked.

In *Samresh Bose versus Amal Mitra* the court observed that the working concept of obscenity would differ from country to country depending on the morals of contemporary society. The court differentiated between ‘vulgarity and obscenity’. The former is not obscene as it arouses a feeling of disgust and revulsion and also boredom but do not have the effect of depraving, debasing and corrupting the morals of any reader of the novel, whereas later has the tendency to deprave and corrupt those minds which are open to such immoral influences.⁷⁵

In *Bobby Art International versus Ompal Singh*,⁷⁶ popularly known as *Bandit Queen* case where a film was prepared on the true story of *Foolan Devi* and it was

⁷¹Section 67 of the Information Technology Act, 2000, ‘Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five laksh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten laksh rupees.

⁷²*Chandrakant Kalyandas Kakodhar v. State of Maharashtra*, AIR 1970 SC 1390.

⁷³AIR 1965 SC 881.

⁷⁴The question came before the Supreme Court in connection with freedom of speech and expression guaranteed by the constitution. This pertains to an obscene passage in the Book ‘Lady Chatterley’s Lover’. The court said that the word obscenity denotes something which is offensive to modesty or decency, which is filthy and repulsive.

⁷⁵AIR 1986 SC 967.

⁷⁶AIR 1996 SC 1846.

released with ‘A’ Certificate. But Delhi High Court restrained the exhibition on the ground of obscenity. Supreme Court allowed the appeal against the decision of the Delhi High court and held that the story of the film is serious and sad-worm of a village born female child who became a dreaded dacoit. The exhibition does not stimulate the sexual arousal due to its context related story.

Coming to the substance of the obscenity in *Khushboo versus Kanniammal and Another*,⁷⁷ the Supreme Court in the context of section 292 of Indian Penal Code, 1860 observed that the publication of a book, pamphlet, paper, writing, drawing, painting, representation, figure, etc., will be deemed obscenity, if

- (i) it is lascivious, i.e. expressing or causing sexual desire, or
- (ii) appeals to the prurient interest, i.e. excessive interest in sexual matters, or
- (iii) the effect of any items tends to deprave and corrupt person, who are likely to read, see, or hear the matter contained in such materials,
- (iv) if a mere reference to sex by itself is not considered obscene.

Significantly, in *Gita Ram and others versus State of Himachal Pradesh*⁷⁸ relying on the judgment of *Bharat Bhushan versus State of Punjab*⁷⁹ Supreme Court observed that exhibiting blue film in which man and woman were shown in the act of sexual intercourse to young boys would definitely deprave and corrupt their morals. Their minds are impressionable on which anything can be imprinted. Things would have been different if that blue film had been exhibited to mature minds. Showing a man and a woman in the act of sexual intercourse tends to appeal to the carnal side of the human nature.

Delving the *ratio-decidendi*, obscenity is determined by immorality in nature and such acts which directly contravene moral norms degrading and depraving our national standard and also being considered majoritarian views that should be regulated for peaceful co-existence of the society. In a sense, the obscenity principles of a country or state or society epitomize the ideals, aspirants, sentiments, precepts and goals of the entire societal values and social orders.

⁷⁷ *Khushboo v. Kanniammal and Another*, AIR2010, S.C. 3196; *Director General of Doordarshan v. Anand Patwardhan* (2006) 8SCC 433; *Ajaya Goswami v. Union of India* (2007) 1 SCC 169.

⁷⁸ 2013 Indlaw SC 323.

⁷⁹ 1999 (2) RCR (Criminal) 148.

5.2 Cyber Obscenity: Meaning

The induction and proliferation of computer,⁸⁰ computer system,⁸¹ and computer resource⁸² has expanded the ambit of the crime of obscenity because the whole world in cyber space is a place under one roof. The ideas, thoughts, expressions, views, culture, tradition and customs flow from one corner of the globe to another with a click of mouse within a fraction of second. Cyber world being a transnational and border-spanning in nature, it is a complex task to combat the menace of pornography and cyber obscenity.

Though obscenity was already present in society in the form of books, magazines, or videos, with the proliferation of the new technology in all walks of life, these are made available within the virtual space which is popularly called cyber obscenity.

Cyber pornography refers to stimulating sexual or other erotic activity over the Internet which includes pornographic websites, pornographic magazines produced using computers to publish and print the material and the Internet to download and transmit pornographic pictures, photos, writing, etc. Hard core pornography including material aimed at pedophiles has earned a bad reputation for the Internet. On the Internet, there is general pornography or other sexual material which is not illegal for adults to access, but there is a specific category of pornography called child pornography which is legally forbidden by almost all the legal systems.

5.3 International Legal Response Against Cyber Obscenity

The chief characteristic of cyber world is that it not only defeats the territorial boundary but also the legal boundary of a particular country. The international element of the commission of cyber obscenity creates new problems and challenges for administration of justice. Therefore, it is the need of the hour to strengthen the international cooperation among the countries to check the phenomenal growth of the cyber obscenity.

⁸⁰Section 2(i) of the Information Technology Act, 2000: Computer means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network.

⁸¹*Id.*, section 2(l) Computer system means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions.

⁸²*Id.*, section 2(k) Computer resource means computer, computer system, computer network, data, computer database or software.

(a) ***G7⁸³ and G8⁸⁴ Groups***

The Expert Group on Misuse of International Networks established by the G7 Countries, Russia and European Union in 1996 and its report identified two areas of misuse, illegal or harmful actions where the Internet was being used to transfer illegal information to users. In order to check these misuses, the report made a number of recommendations. The very valuable recommendations with regard to the present discussion are as follows:

- (i) strengthen international mechanisms for addressing illegal actions, e.g. by creating a well defined set of international minimum rules against illegal actions, such as hacking, computer espionage, computer sabotage, computer fraud and copyright infringements,
- (ii) strengthen international mechanisms for addressing illegal contents, e.g. by creating a well defined set of international minimum rules for illegal contents to be prosecuted and punished worldwide, especially with respect to child pornography, bestiality, the glorification of violent hate speech as well as defection of minorities and individual persons,
- (iii) encourage countries to prescribe an adequate set of rules for the responsibility of internet access providers and service providers, e.g. by creating a legal system so that in all countries service providers must undertake reasonable efforts to erase illegal contents on their servers when made aware of these contents, while at the same time, the free flow of data should not be hindered by attempts to block access to other server and holding access providers liable,
- (iv) encourage countries to establish national laws for the effective prosecution of computer crimes, especially with respect to search and seizure of computer systems and international networks, duties of witnesses (e.g. to provide passwords or to decrypt files,) wire tapping and accessing computer systems,
- (v) address possible abuses of anonymity, and install an international system for lifting anonymity in cases of abuse, thereby requiring adequate legal safeguards for privacy rights (e.g. by demanding court orders as a prerequisite for transferring specific data to the prosecuting authorities), thereby considering the fact that lifting anonymity is only possible, if all countries co-operate, which are crossed by communication,

⁸³Developing country is a term generally used to describe a nation with a low level of material well being (not to be confused with third world countries). Since no single definition of the term developed country is recognized internationally, the level of the development may vary widely within so called developing countries. Some developing countries have high average standard of living.

⁸⁴Developed countries are those that have high levels of development and a highest stand of living. These countries are Sweden, Germany, Ireland, Canada, New Zealand, Britain, Norway, Finland, Netherlands, USA and Australia.

- (vi) develop an international information network and other information systems with respect to the prosecution of illegal and harmful practices detected on the internet,
- (vii) foster cooperation amongst law enforcement agencies with special reference to urgent measures for freezing data in international search and seizure procedures,
- (viii) clarify issues of jurisdictions; and
- (ix) educate and train law enforcement agencies about cyber crimes and its prosecution.

(b) Budapest Convention

On 23 November 2001, Convention on Cyber Crime was organized by the members⁸⁵ having convinced that the present convention is necessary to stop action directed against the confidentiality, integrity and availability of computer system, networks and computer data as well as the misuse of such system networks and data by providing for the criminalization of such conduct as described in this convention, and the adoption of powers sufficient for effectively combating such offences by facilitating their detection, investigation and prosecution at both the domestic and international levels and by providing arrangements for fast and reliable international cooperation. By and large, the said convention acknowledges the fact that international cooperation in respect of prohibition, investigation, extradition, and mutual legal assistance are the strong weapons against cybercrimes including cyber obscenity which is commonly known as content related offence.

The Budapest Convention in its Title-IIIas Content Related Offences⁸⁶ contains provisions concerning these offences. According to Article 9, the following conduct when committed intentionally and without right shall amount to an offence:

⁸⁵Ministers or their representatives from the following 26 member states signed the treaty: Albania, Armenia, Austria, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, the Former Yugoslav Republic of Macedonia, Ukraine and the United Kingdom. Other 4 members, Canada, Japan, South Africa and U.S.A took part in drafting and also signed the treaty.

⁸⁶The Budapest Convention, 2001, Article 9 provides that

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct:
 - a. Producing child pornography for the purpose of its distribution through a computer system;
 - b. Offering or making available child pornography through a computer system;
 - c. Distributing or transmitting child pornography through a computer system;
 - d. Procuring child pornography through a computer system for oneself or for another; and
 - e. Possessing child pornography in a computer system or on a computer data storage medium;
2. For the purpose of paragraph 1 above child pornography shall include pornographic material that visually depicts:
 - a. a minor engaged in sexually explicit conduct;
 - b. a person appearing to be a minor engaged in sexually explicit conduct;
 - c. realistic images representing a minor engaged in sexually explicit conduct;

- (i) producing child pornography for the purpose of its distribution through a computer system;
- (ii) offering or making available child pornography through a computer system;
- (iii) distributing or transmitting child pornography through a computer system;
- (iv) procuring of child pornography through a computer system for one self and another person; and
- (v) possessing child pornography in a computer system or on a computer data storage medium.

(c) Commonwealth Nations

The ‘Model Law on Computer and Computer Related Crime’ prepared by the Commonwealth⁸⁷ Secretariat in October 2002 has had a wide influence on domestic legislation. Through this model law, the convention on cyber crime has become one of the legislative choices in substantive criminal law, covering the offences of illegal access, interfering with data, interfering with computer systems, and illegal interception of data, illegal data and child pornography. Compared with the Convention on Cyber Crime, the Model Law expanded criminal liability for the offences of interfering with data, interfering with computer systems, and using illegal devices. The Model Law also covers the problems of dual criminality by stating that the law applied to an act done or an omission made by a national of a State outside its territory, if the person’s conduct would also constitute an offence under a law of the country where the offence was committed. This may lead to prosecution or extradition based on dual criminality, but not extradition as provided in the Convention on Cyber Crime.⁸⁸

Some of the member countries of the Commonwealth such as Barbados, Belize and Guyana have made efforts to draft domestic law according to the model law.⁸⁹ However, in many other countries of the Commonwealth, there is still no special

(Footnote 86 continued)

3. For the purpose of paragraph 2 above, the term minor shall include all persons less than 18 years of age. A Party may, however, require a lower age-limit, which shall be not less than 16 years; and
4. Each Party may reserve the right not to apply, in whole or in part, paragraph 1(d) and 1(e), and 2(b) and 2(c).

⁸⁷Free association of sovereign states formed in 1991, comprising Russia and a number of other republics that were formerly part of the Soviet Union. Members are Russia, Ukraine, Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, Armenia, Azerbaijan, and Moldova. Georgia, originally a member, withdrew from the association in 2009. The administrative centre is in Minsk, Belarus. The CIS’s functions are to coordinate its member’s policies regarding their economies, foreign relations, defense, immigration environmental protection, and law enforcement.

⁸⁸Legal and Constitutional Affairs Division Commonwealth Secretariat Report on *Law and Technology Workshop for Caribbean*, Kingston, Jamaica, 3–7 November, 2003, published in September, 26, 2009, available at: <http://www.webology.ir/2007/v4n3.html> [accessed on July 29, 2013].

⁸⁹*Ibid.*

legislation for cyber crime.⁹⁰ Besides impelling legislation within the forum, another focus of the Commonwealth is on mutual assistance in law enforcement between Commonwealth member states and Non- commonwealth States. In the 2005 Meeting of Commonwealth Law Ministers and Senior Officials, the Expert Working Group proposed 10 recommendations for member states to adopt suitable measures for improving domestic law enforcement and transnational assistance, and encouraged member states to sign, ratify, accede to and implement the Convention on cyber crime as a basis for mutual legal assistance between Commonwealth member states and non-Commonwealth states.⁹¹

5.4 National Legal Response

(a) United Kingdom

The Obscene Publication Acts 1959 and 1964 as amended by the Criminal Justice Public Order Act, 1994 cover the material that has the effect of depraving and corrupting. According to section 2 of the Obscene Publication Act, 1959 an offence is committed if a person publishes obscene article. However, it is not an offence to posses' obscene material in private as long as there is no attempt to publish, distribute and show it to others. However, child pornography possession as well as circulation is criminalized.⁹² In 1994, the Criminal Justice and Public Order Act amended the Protection of Children Act, 1978 and the Criminal Justice Act, 1988 and it extended offences in relation to the distribution and possession of indecent photographs of children to the concept of pseudo-photographs created through the use of digital images. The regulation of adult extreme pornography and the criminalization of possession through the Criminal Justice and Immigration Act, 2008⁹³ is a novel creation within the European Continent. section 63(1) of the Criminal Justice and Immigration Act, 2008 makes it an offence to be in possession of an extreme pornographic image. An image is deemed to be extreme if, it portrays, in an explicit and realistic way, any of the following:

⁹⁰McConnel International 2000, “*Cyber Crime and Punishment? Archaic Laws Thracat on Global Information*, available at: <http://www.mcconnelinternational.com> [accessed on July 29, 2013].

⁹¹Commonwealth Secretariat, The Harare Scheme on Mutual Assistance in Criminal Matters; Possible Amendments to the Scheme and Discussion of Interception of Communications and Related Matters, Meeting of Commonwealth Law Ministers and Senior Official, Accra, Ghana, 17–20 October 2005, available at: <http://www.webology.ir/2007/v4n3/a45.html> [accessed on July 26, 2013].

⁹²The Criminal Justice Public Order Act, 1988, section 160 makes it an offence for a person to have any indecent photograph of a child in his possession.

⁹³The new offence for the possession of extreme pornography was introduced in the U.K. through the Criminal Justice and Immigration Act, 2008 which came into force in January 2009. This covers consensual acts, involving adult participants and was described as the first possession offence for adult pornography in Europe.

- (i) An act which threatens a person's life,
- (ii) An act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,
- (iii) An act which involves sexual interference with a human corpse, or
- (iv) A person performing an act of intercourse or oral sex with an animal (whether dead or alive), where a reasonable person looking at the image would think that any such person or animal was real.

In *R. versus Fellows*⁹⁴ the two accused were charged with 18 charges under the Protection of Children Act, 1978, Obscene Publications Act, 1959 and the Criminal Justice and Public Order Act, 1994 the court which widened the definition of publication to include computer transmission. In *R. versus Bowden*,⁹⁵ it was observed that downloading and printing images from the Internet fell within the concept of making as the term applies not only to original photographs but also to negative copies of photographs and data stored on computer disc. Again while applying the Protection of Children Act, 1978 and Criminal Justice Act, 1988, issue regarding cache copies came up before the court. In *Atkins and Goodland versus Director of Public Prosecutions*,⁹⁶ the pornographic material was contained in the cache memory of the defendant's machine which is generally created and stored automatically by the browser software and the user is unaware of the activity. As the prosecution failed to prove that the defendant was aware of the cache copies the conviction could not be upheld in appeal as the court ruled that knowledge of the offending material on the part of the defendant was necessary to make him liable under section 1 (1) of the Protection of Children Act, 1978 or under section 160 of the Criminal Justice Act, 1988.

Similar issues came up before the court in *R. versus Westgarth Smith and Jayson*,⁹⁷ the prosecution was able to prove that the defendant was aware of the caching function within his browser software and the court held that the mere act of voluntarily downloading the indecent image from a web page to computer screen is an act of making. section 7(4)(b) of the Protection of Children Act, 1978 recognizes as publications photographs stored on computers and even pseudo-photographs, digitally altered images especially used by pedophiles to merge the bodies of adults with the faces of children.

(b) *United States*

Under US Law to be called as obscene, a material must appeal to a prurient or shameful interest in sex and it must be patently offensive according to local community standards. However, this provision of patently offensive of local standards may be very difficult in the context of Internet set up where the alleged explicit materials are not only in public places but also in the privacy homes. For examples,

⁹⁴ *R. v. Fellows* (1937) 2 ALL ER 548.

⁹⁵ *R. v. Bowden* (2000) 1 Criminal App. R 438, 444, per Otton LJ.

⁹⁶ EWHC Admin 302, 8th March, 2000.

⁹⁷ EWCA Criminal Journal, 2002, at 683.

San Francisco or Amsterdam sexual explicit material degrading and depraving the moral standard may be transmitted to the so called Bible-Belt areas and then whose standard can or ought to)be applied here becomes difficult to answer.

The American Congress in 1996 passed the Communications Decency Act, 1996 (CDA) which prohibits a person in interstate or foreign communications who uses a telecommunication device from knowingly making, creating, or soliciting any comment, request, suggestion proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.

However, in June, 1997, the US Supreme Court ruled that CDA was unconstitutional since the banning of any online service that displayed indecent content that may be accessible by persons who are less than 18 years amounted to a denial of access to that same material by adults, hence breaching their First Amendment rights. The CDA having being struck down, Congress tried again, the following year, to introduce the Child Online Protection Act in 1998 (COPA). This Act was less sweeping than the CDA, and made provision for prohibiting-any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.

The Children Internet Protection Act, 2003 (CIPA) is an attempt to limit children's exposure to pornography and explicit content online. CIPA is a federal law enacted by the US Congress to address concerns about access to offensive content over the Internet in school and library computer.

5.5 Indian Legislative Response

The Information Technology, 2000 and Information Technology (Amendment) Act, 2008, provides that whoever published or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to 3 years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to 5 years and also with fine which may extend to ten lakh rupees.⁹⁸

The quantum of punishment has undergone a change as the term of imprisonment has been decreased in the first conviction, from 5 to 3 years and in the second conviction, from ten to 5 years while the amount of fine has been increased from one lakh to five lakh rupees in the first conviction and from five lakh to ten lakh

⁹⁸The Information Technology Act, 2000, section 67.

rupees in the second conviction. However, this section suffers from many defects viz. (a) Section 67 says nothing about the knowledge of the offender, i.e. it says nothing about the cases where such offending material is hidden in the cache memory of a system which the offender is unaware of; (b) The term obscenity has not been defined in Indian Penal Code nor in any other statute prevalent in India.

According to section 67A⁹⁹ provides that whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to 5 years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to 7 years and also with fine which may extend to ten lakh rupees.

The new section clearly comes out with the explanation that an act which depicts sex appealing activities in electronic form is also punishable. The section thus enlarges the area of obscenity and includes within it, depiction of sex activities. It is for the first time that any Indian law defines such type of offence thereby indicating indirectly that depiction of sex related act in public is intolerable. The punishment given here is two-tier which only shows that the fear of graver punishment may deter the criminal to commit the offence for the second time.

In recent years, the exploitative use of children in the production of pornography has become serious problem. A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof, he employs, authorizes or induces a child to engage in a sexual performance. Section 67B¹⁰⁰ provides

⁹⁹Inserted by section 32, the Information Technology (Amendment) Act, 2008.

¹⁰⁰*Id.*, section 67B: Whoever:

- (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct: or
- (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner: or
- (c) cultivates, entices or induces children to online relationship with one or more children for an on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource: or
- (d) facilitates abusing children online: or
- (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

Provided that provisions of section 67, section 67-A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form:

- (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is the interest of science, literature, art or learning or other objects of general concern: or
- (ii) which is kept or used for bona fide heritage or religious purposes.

punishment for publishing or transmitting material which depicts children in sexually explicit act, etc., in electronic form. It dwells well on the subject of child pornography. It elaborates as to what constitutes child pornography and is pioneer legal provision in the country as even in the Indian Penal Code, 1860,¹⁰¹ the Child pornography is not mentioned. The reason could be well understood in the context that India is a religiously dominated society where morality and spirituality are deep rooted. Even lawful wedlock's keep shy of sexual behavior in the eye of the family or public. Going to the extent of indulging in physical exploitation with the underage is though not ruled out but publicizing the same and making it a profession, was hitherto unknown. While the underage are physically and economically exploited their use before the public eye and their depiction for public show has been scant in India. Thus, formulating law on this subject was hitherto not necessitated by public demand or social needs until the Internet space made it common and the foreign element aided in its polarizing among the masses.

The section covers not only the publication or transmission of it but also the creation of the browsing and downloading of these objectionable objects posted by others. Thus, any human act connected with child pornography comes under the definition of child pornography though the term has not been included in the section. The section provides not only grave corporal punishment, the pecuniary punishment is also heavy.

Section 66E¹⁰² also relates to obscenity which provides that whoever, intentionally or knowingly captures, publishes or transmits the image of a private area¹⁰³ of any person without his or her consent shall be punished with imprisonment which may extend to 3 years or with fine not exceeding two lakh rupees, or with both.

(Footnote 100 continued)

Explanation: For the purposes of this section, Children means a person who has not completed the age of 18 years.

¹⁰¹The Indian Penal Code, 1860, sections 292, "if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." And section 293: whoever sells lets to hire, distributes, exhibits, or circulates to any person under the age of twenty years any such obscene object as it referred to in the last preceding section, or offers or attempts so to do, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and with fine which may extend to two thousand rupees, and in the event of a second or subsequent conviction, with imprisonment of either description for term which may extend to seven years, and also with fine which may extend to five thousand rupee.

¹⁰²The Information Technology Act, 2000, section 67.

¹⁰³*Id.*, section 66E(C) private area means the naked or undergarment clad genitals, public area, buttocks or female breast.

5.6 Indian Judicial Response

The growth of Internet in the first decade of twenty-first century, and the ever increasing number of pornography websites have prompted the judiciary to make up for differences and gaps by application of living law¹⁰⁴ and existing law. The *State of Tamil Nadu versus Suhas Katti*¹⁰⁵ was the case under section 67 of the Information Technology Act, 2000 which was decided within a relatively quick time of 7 months from the filling of the First Information Report. This case is considered as a land mark case in the history of cyber crime Management in India.

In *Prakash (Dr.) versus State of Tamil Nadu*,¹⁰⁶ Dr. Prakash, the petitioner, was detained under section 3(1) of the Tamil Nadu Preventive Detention of Bootleggers, Drug Offenders (Forest Offenders), Goondas, Immoral Traffic Offenders and Slum-Grabbers for Preventing-their dangerous Activities Prejudicial to the Maintenance of Public Order Act, 1982. The main grounds of detention of the petitioner were that he was indulging in offences under section 67 of the Information Technology Act, 2000 and also sections 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986.

In *Avnish Bajaj versus State*,¹⁰⁷ the court opined that *prima facie* it appears that the listing of a nude photograph of a student of Delhi public school, RK Puram answered the definition of obscenity since it contained words or writing that appealed to the prurient interest as a whole and was such as to tend to deprave or corrupt person, who are likely to read, or sell or hear the matter contained or embodied in it. The listing contained explicit words ‘this video is of a girl from Delhi public school, RK Puram which has been filmed by his boyfriend in very sexual explicit conditions’ were a prominent feature of the listing which invited a potential buyer to purchase the obscene object which was the video clip by projecting it as child pornography, since reference was to a school child. The petitioner the court did not agree with the argument that the listing itself was not even an obscene material or text.

Similarly, in *Fatima Riswana versus State Rep. by A.C.P. Chennai*,¹⁰⁸ the Supreme Court rejected the High Court order of transfer of the sessions trial from V Fast Track Court to IV Fact Track Court as the High Court directed the transfer of the case at the instance of the accused, who was booked under the section 67 of the Information Technology Act and various other provisions of the Indecent Representation of Women (Prohibition) Act, 1986, Immoral Traffic (Prevention)

¹⁰⁴The concept of living law as in the USA during the 1920s evolved around the notion that although laws may be out of date: the application of them, through the judiciary, kept the law current. L. Brandeis, *The Living Law*, 1916.

¹⁰⁵*State of Tamil Nadu v. Suhas Katti*, 2004, available at: www.navvi.org/cleitorial04/suhaskatti_case.htm [accessed on July 20, 2013].

¹⁰⁶(2000) 7 SCC 759.

¹⁰⁷150 (2008) DLT 769.

¹⁰⁸(2005) 1 SCC 582.

Act, 1956, etc. The basis of the transfer was that the entire proceedings in the trial would be about exploitation of women and their use in sexual escapades and the evidence in the case is in the of CDs and viewing of which would be necessary for the course of the trial therefore for a women Presiding Officer it would cause embarrassment.

Another case of cyber pornography includes the *Air Force Bal Bharati School*¹⁰⁹ case. A 12th standard student of the Air force Bal Bharati School, Delhi, scanned photographs of his classmates and teachers, morphed them with nude photographs and put them up on a website. The matter came to light when the father of one of the girls featured on the website objected and lodged a complaint with the police to take any action.

In a recent occurrence, Ms. Surekha a young girl was about to be married to Mr. Suraj. He had seemed to be open minded and pleasant. Then, one day he told her that, members of his family were receiving e-mails that contained malicious and abusing things about her character. Fortunately, Mr. Suraj approached the police instead of blindly believing the contents of the e-mails. During investigation, it was revealed that the person sending those e-mails was none other than Ms. Surekha's stepfather. He had sent these e-mails so as to break up the marriage. The girl's marriage would have caused him to lose control of her property of which he was the guardian till she got married.¹¹⁰ In another incident the Cyber Crime Investigation Cell of the Mumbai Police crime Branch in March, 2004, arrested two 14 years old school students for allegedly creating an obscene profile of their physical training teacher titled black prostitute and posted the teacher's photographs and mobile on a popular social networking site. When the teacher got to know of this from friends, she approached the cyber crime cell. An offence was registered and they were arrested.

In March, 2005 in Kolkatta, a 26 years old lady teacher became victim of spy camera. In this case, the accused fitted a spy camera in the ventilator of victim's room and tracked every movement of that lady violating her right to privacy. On the basis of victims complaint police found the spy camera plugged into the television. Police also found a computer and mobile phone with obscene pictures of the lady from the room of the accused. He was charged under section 67 of the Information Technology Act, 2000.¹¹¹

In Pune, police registered a case on the basis of complaint made by three girls. Those girls suspected that their landlord *Mohan Kulkarni* was filming their private movements. Police investigated and found three web camera fitted in the tube light of one room which was occupied by those girls. Thereafter, *Kulkarni* was arrested

¹⁰⁹The *Air Force Balbharati School* Case 2001, available at: <http://www.cyberlaw.org/Extracts, www.reddiffmail.cp>, [accessed on June 22, 2013].

¹¹⁰R.C. Mishra, *Cyber Crime: Impacts in the New Millennium*, (Authors Press Global Network, New Delhi, 1st ed., 2002) at 282.

¹¹¹The Times of India, March 30, 2005.

and charged under section 509¹¹² of Indian Penal Code and under section 67 of the Information Technology Act, 2000.¹¹³

Understanding the cascading impact of cyber obscenity, the Information Technology Act¹¹⁴ provides the overriding effect being a special legislation. For instance, if one compares section 67 of this Act with section 292 of Indian Penal Code, though one may find certain similarities in the construction of both the sections, the punishment provision under section 67 of the Act is far more stringent than what is being given under section 292 of Indian Penal Code, 1860. Thus, any offences related to obscenity in electronic form must only be tried under the provisions of section 67 and any attempt to import provisions of section 292, IPC would tantamount to disregard the legislation intent behind the Act.

With regard to the relationship between general law and special law, the Supreme Court in *Jeewan Kumar Rout versus CBI*¹¹⁵ held that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. Transplantation of Human organs Act, 1994 being a special Act the same would prevail over the provisions of Criminal Procedure Code, 1973.

6 Conclusion and Suggestions

The exponential growth and pervasive impact of information technology have become one of the most significant catalysts for the Indian socio-economic and political governance. Furthermore, this sector has played a tremendous role in transforming India's image in providing world-class technology solution and business services. This is only one constructive facet of the information revolution. The other facets are the challenges for the whole world as there is no single authority that governs cyberspace. Cyber crimes know no geographical limitations, boundaries and the perpetrators of crime remain in anonymity. Although the Miller test is still good law today, with development of the Internet, a new flaw has emerged. The Miller test's reliance on 'community standard' is problematic in the context of the borderless world of cyberspace. The following suggestions may be offered to control the menace of cyber obscenity in digital world:

¹¹²Whoever, intending to insult the modesty of a woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine or with both.

¹¹³The Time of India, January 01, 2006.

¹¹⁴Section 81 of the Information Technology Act, 2000, 'the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Provided that nothing contained in this Act shall restrict any person from exercising any right conferred under the Copyright Act, 1957 or the Patents Act, 1970.

¹¹⁵(2009) 7 SCC 526.g.

- (i) In the Indian setting, there is a need to create information consciousness among the Indian citizens as prevention is always better than cure. It is always better to adopt certain precaution while operating the computer system. One of the obvious reasons for all this problems being faced by public is the fact that the laws defined in Information Technology are not known to the stake holders.
- (ii) Cyber obscenity in India is dealt with under traditional legal system and we do no have special courts to deal with the matters related to online medium offences. These offences are mostly dealt with following the Criminal Procedure Code, Indian Penal Code and Information Technology Act but there is a big problem of lack of acquaintance regarding this new crime and related laws among the judges of the courts.
- (iii) To check the menace of cyber obscenity, proactive and independent cyber crime substantive law as well as procedure is to be enacted separating these provisions from Information Technology law and also Indian Penal Code. Furthermore, the procedural law must address the aspect of extradition of accused of cyber crime and mutual legal assistance in search and seizure.
- (iv) Lack of universalisation of Cyber Laws, jurisdictional uncertainty and inadequate international cooperation to address the problems of cross-border cyber criminality enable criminals to escape arrest and prosecution. Although the Information Technology Act contains specific provisions of cyber obscenity and extraterritorial jurisdiction, such powers are largely inefficient on account of lack of reciprocity, extradition treaties and mutual legal assistance treaties with a large number of countries.
- (v) Loss of evidence in cyber world is a very common problem because it is routinely destroyed by the cyber offender only by clicking the button of the mouse. The prime thrust of the Information Technology Law is on functional equivalence principles. Therefore, in administration of justice, the adjudicators must be trained to assess the probative value of electronic records.
- (vi) Internet Service Providers must be brought together to chalk out certain common policies. If an international code can be formulated, it would go a long way in regulating the availability of such material and conduct of service providers.
- (vii) Stakeholders of the Internet can be made aware of tools used for software filtering. These software products allowed the blocking out of certain sites with objectionable or pornographic material and children may be protected from being exposed to pornography, and
- (viii) The existing laws as well as the recent amendments are being implemented in true spirit so as to curb the menace of obscenity. However, we should remember that the pleasure of few cannot outweigh the interests of society which is of paramount importance in any civilized society.

Part V

Legal Education

Chapter 35

Research Excellence in Legal Education: A Critical Assessment of the Research Excellence Framework 2014 and the British Approach

Robert P. Barnidge Jr.

1 Introduction

How does one assess research excellence in legal education? Is it the extent to which ideas attract external funding, that is, the approval and sanction of moneyed interests, be they governmental or non-governmental? Is it through the recognition of one's peers? If so, which peers "matter"? Is it the sheer number of citations in peer-reviewed publications, reports of advocacy groups, and court judgments, domestic and international? Is it a combination of these? Research can influence the law and social change in ugly and unpleasant ways, and one can certainly imagine that establishment forces would have a vested interest in demonizing threats to their authority. In *Hind Swaraj*, for example, Mahatma Gandhi, criticizing what he called "modern civilization," noted that "[w]e rarely find people arguing against themselves. Those who are intoxicated by modern civilization are not likely to write against it. Their care will be to find out facts and arguments in support of it, and this they do unconsciously, believing it to be true."¹ In light of these concerns, this chapter critically assesses some aspects of the 2014 Research Excellence Framework (REF), the approach that British higher education funding bodies have taken to assessing research excellence in legal education.²

¹Mahatma Gandhi, *Hind Swaraj*, 28 (2010); On *Hind Swaraj*, see B.S. Chimni, "The Self, Modern Civilization, and International Law: Learning from Mohandas Karamchand Gandhi's *Hind Swaraj* or Indian Home Rule", 23(4) *European Journal of International Law*, 2012, at 1159.

²Research Excellence Framework, 2014, (REF) available at: <http://www.ref.ac.uk/>; The REF defines research as a "process of investigation leading to new insights, effectively shared."; REF 2014, Assessment Framework and Guidance on Submissions (updated to include addendum published in January, 2012), annex C at 48, REF 02.2011 (July 2011), available at: <http://www.ref.ac.uk/media/ref/content/pub/assessmentframeworkandguidanceonsubmissions/GOS%20including%20addendum.pdf> (Assessment and Guidance).

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2 The 2014 Research Excellence Framework

The REF replaces and builds upon, with a view to “improving,” the 2008 Research Assessment Exercise (RAE), the approach that British higher education funding bodies took during the previous assessment period in 2008.³ Key changes between the RAE and the REF include the almost halving of the number of units of assessment (from 67 to 66) and a reduction (from 15 to 4) of the number of main panels, a shift from a bottom-up approach to a top-down approach to assessment criteria and working methods, the exclusion of “esteem” as an element of assessment, greater sensitivity to issues of equality and diversity, and greater attention to qualitative data in the assessment of environment.⁴ Obviously, these changes reflect criticism, some constructive, some not, of the RAE. A key concern with the RAE was that there was insufficient consistency across it and that the REF needed to remedy this.⁵ In addition to informing how higher education funding bodies will allocate research grants from 2015 to 2016, the REF aims to ensure accountability, showcase the fruits of public investment in the higher education sector (a self-interested task indeed), benchmark information about higher education, and recalibrate reputational perceptions of higher education institutions.⁶

In brief, the REF seeks to assess the quality of research in higher education institutions with regard to three criteria: outputs, impact, and environment. The REF breaks down higher education institutions into 36 units of assessment, and each submitted unit is assessed according to these three criteria. Generically speaking, REF sub-panels for the units of assessment assess each submission according to outputs, impact, and environment as follows: outputs for “‘originality, significance and rigor’, with reference to international research quality standards”⁷; impact for the “‘reach and significance’ of [each submission’s] impacts on the economy, society and/ or culture that were underpinned by excellent research conducted in the submitted unit, as well as the submitted unit’s approach to enabling impact from its research”⁸; and environment for the “‘vitality and sustainability’ [of each submitted unit’s research environment], including its contribution to the vitality and sustainability of the wider discipline or research base.”⁹ Outputs from individual researchers count for 65% of each submitted unit’s overall mark, impact counts for 20%, and environment counts for 15%, and quality levels range from between four stars (the highest classification level) down to one star (the lowest classification

³Research Assessment Exercise 2008, available at: <http://www.rae.ac.uk/>.

⁴Assessment and Guidance, *supra* note 2, at 10.

⁵REF 2014, Panel Criteria and Working Methods, at 3, REF 01.2012, available at: http://www.ref.ac.uk/media/ref/content/pub/panelcriteriaandworkingmethods/01_12.pdf (Criteria and Methods).

⁶Assessment and Guidance, *supra* note 2, at 4.

⁷Criteria and Methods, *supra* note 5, at 6.

⁸Ibid.

⁹Ibid.

level) and unclassified.¹⁰ This is the general framework across the units of assessment, and generally speaking, higher education institutions are expected to submit between one and four pieces of research for each of their returned members of academic staff and researchers.¹¹

Of the four main panels, law is in Main Panel C, along with such cognate disciplines as politics and international studies, sociology, anthropology and development studies, social work, and social policy.¹² An obvious methodological concern here would be that this formally seems to establish rigid disciplinary boundaries. How might the REF's disciplinary structure potentially affect assessment outcomes for interdisciplinary research? On paper, one can only say that the REF seems to have done everything reasonably possible to support interdisciplinary research within its assessment structure. It recognizes, for instance, the intrinsic value of interdisciplinary research and notes that the 36 units of assessment have no "firm or rigidly definable boundaries."¹³ Formally, interdisciplinary research "will not be penalized,"¹⁴ and where appropriate, individual sub-panels will be able to call upon outside assessors and other sub-panels and main panels for advice on particular outputs and impact case studies.¹⁵

Although the REF is marked by a shift from a bottom-up approach to a top-down approach to assessment criteria and working methods, REF main panels are allowed some degree of discretion when it comes to approaching assessment criteria and working methods. As regards outputs, the most important, at 65%, of the three criteria for assessing research quality in higher education institutions under the REF, Main Panel C will decidedly not take into account journal impact factors or perceived hierarchies of prestige between journals when making its assessments.¹⁶ Main Panel C has also issued interpretative guidance that it will use when engaging with the generic REF output assessment criteria of "originality, significance, and rigor," as well as a more specific understanding of the quality levels within its units of assessment.¹⁷ This guidance is exceedingly detailed and is meant to channel judgments in a predictable fashion among the sub-panelists on Main Panel C.

The REF defines impact, which counts for 20% of each submission's overall mark, as "effect on, change or benefit to the economy, society, culture, public policy or services, health, the environment or quality of life, beyond academia (as set out

¹⁰REF 2014, Assessment Criteria and Level Definitions, 2012, available at: <http://www.ref.ac.uk/panels/assessmentcriteriaandleveldefinitions/> (Criteria and Definitions).

¹¹Assessment and Guidance, *supra* n. 2, pp. 17–26.

¹²Criteria and Methods, *supra* note 5, pp. 58–77; In addition to legal education research, the REF describes law as including theoretical, doctrinal, comparative, empirical, critical, historical and other research on law and such legal phenomena as criminology, and socio-legal studies. *See id.*, at 60.

¹³*Id.*, at 13.

¹⁴*Ibid.*

¹⁵*Id.*, pp. 13–14; See also Assessment and Guidance, *supra* note 2, pp. 15–16.

¹⁶Criteria and Methods, *supra* note 5, at 64, But, see *Id.*, at 66.

¹⁷*Id.*, pp. 66–67.

in paragraph 7).¹⁸ The focus here is to demonstrate the relevance of publicly funded research to beneficiaries outside of the “ivory tower.” The impact aspect of each submission requires a completed impact template describing the strategy that each particular unit of assessment has taken to enhancing impact: this will be assessed according to the “extent to which the unit’s approach is conducive to achieving impacts of reach and significance.”¹⁹ In addition to the completed impact template, this aspect of the REF requires the submission of impact case studies. The number of case studies required for each submission will depend upon the number of returned academic staff, with the case studies being focused and tailored examples of how research in a particular unit of assessment of at least a two star quality has made a “distinct and material contribution”²⁰ to impact.²¹ The presumption is that the impact case studies will count for 80% of the overall impact mark for each submission.²²

Given the social science-nature of many of the units of assessment in Main Panel C, it is worth noting that Main Panel C adopts what one might call a “neutral” approach to research that seeks to hold public and private bodies to scrutiny in that it acknowledges that research impact can introduce critical debate into the public sphere that may not actually preempt a potential change in government policy, can stimulate debate that precludes a change in government policy, and can simply facilitate robust debate among stakeholders.²³ Main Panel C gives an illustrative, non-exhaustive list of potential impact that ranges from impact upon creativity, culture, and society and practitioners and professional services to impact upon the environment and public policy, law, and services.²⁴ The REF advises that the particular unit of assessment’s completed impact template should explain and provide evidence for the context of and approach to impact and articulate the strategy of the particular unit of assessment and the relationship between its strategy and overall support for impact and the specific impact case studies submitted.²⁵ Main Panel C has clarified that “reach” in “reach and significance,” the generic criteria for impact across the REF, focuses on the diversity and extent of impacted

¹⁸Assessment and Guidance, *supra* note 2, at annex 3 at 48. Paragraph seven reads as follows: “For the purposes of the impact element of the REF: (a) Impacts on research or the advancement of academic knowledge within the higher education sector (whether in the UK or internationally) are excluded. (The submitted unit’s contribution to academic research and knowledge is assessed within the ‘outputs’ and ‘environment’ elements of REF.) (b) Impacts on students, teaching or other activities within the submitting HEI are excluded. (c) Other impacts within the higher education sector, including on teaching or students, are included where they extend significantly beyond the submitting HEI.”

¹⁹*Id.*, at 28.

²⁰*Id.*, at 29.

²¹*Id.*, pp. 28–30.

²²*Id.*, at 27.

²³Criteria and Methods, *supra* note 5, at 68.

²⁴*Id.*, pp. 69–70.

²⁵*Id.*, pp. 73–74.

communities and that “significance” looks at the degree and extent of impact upon concrete policies and positions.²⁶

Environment, one will recall, is to be generically assessed according to “vitality and sustainability.” What particular units of assessment are expected to provide for environment is a combination of quantitative and qualitative data. Quantitative data should reveal the number of research doctorates awarded during the academic years under review and information about research income and research income-in-kind.²⁷ The completed environment template with qualitative data should give an overview of the research environment with a view to contextualizing it within the particular unit of assessment, the research strategy, the strategy for staffing and the development and progression of staff and research students, an explanation of how the particular unit of assessment has sought out and secured research funding and oriented its facilities and infrastructure in this direction, and information about collaboration across the discipline, including support for interdisciplinary research.²⁸ For environment, Main Panel C has clarified that “vitality” in “vitality and sustainability” looks at whether the particular submitted unit has a “thriving, dynamic and fully participatory research culture based on a clearly articulated research strategy, displayed both within the submitting unit and in its wider contributions, and in terms appropriate to the scale and diversity of the research activity that it supports”²⁹ and that “sustainability” is to be understood as how the research environment can be maintained and built upon in future.³⁰

3 Some Brief Thoughts About the Research Excellence Framework 2014

Unsurprisingly, the REF has generated a considerable diversity of opinion among research-active academics in the United Kingdom. One need only to take a quick glance at the Readers’ Comments section in any article that discusses the REF in the magazine of record of British higher education, the Times Higher Education, to appreciate this.³¹ It is also worth noting that the REF published a helpful summary in March 2012 of the responses that it received on draft panel criteria and working

²⁶*Id.*, at 74.

²⁷Assessment and Guidance, *supra* note 2, pp. 30–32, See also Criteria and Methods, *supra* note 5, pp. 76–77.

²⁸Assessment and Guidance, *supra* note 2, pp. 32–33, See also Criteria and Methods, *supra* note 5, pp. 75–76.

²⁹Criteria and Methods, *supra* note 5, at 77.

³⁰*Ibid.*

³¹See, e.g., Paul Jump, “Research Intelligence—What’s on the Cards for the REF?”, *Times Higher Education*, September 20, 2012, available at: <http://www.timeshighereducation.co.uk/story.asp?storycode=421179>.

methods.³² Suffice it to say that, to a greater or lesser extent, nearly every aspect of the REF has been criticized. It is obviously not possible to examine all of these criticisms here, but it is worthwhile to look at three of them in particular, namely the process by which panelists (and assessors) have been chosen, how panelists (and assessors) within particular main panels will engage with specific main panel criteria in light of the REF's generic assessment criteria, and the question of rights of appeal.

The process by which panelists (and assessors) have been chosen is obviously important because these individuals will be the ones who will be making such consequential decisions as to output, impact, and environment for the submissions. Chairs Designate for the four main panels were chosen by the higher education funding bodies after an open application process.³³ Ordinary panelists for the main panels and the sub-panels, as well as assessors, were chosen after nominations were received from nearly 2000 research-related bodies from around the world,³⁴ and they include leading researchers within academia and senior end users of academic research.³⁵ Interested individuals were able to apply directly to the REF for sub-panel chairs.³⁶ Ultimate responsibility for choosing panelists (and assessors) lies with the higher education funding bodies, who have committed themselves to choosing panelists (and assessors) to reflect, *inter alia*, diversity, expertise across the entirety of research fields within particular units of assessment, and a balance between members with assessment experience in the RAE and those without such experience.³⁷ The REF requires that all panels reaffirm their competence to assess at the beginning of each assessment meeting.³⁸

Overall, the process by which panelists (and assessors) have been chosen for the REF seems credible. It reflects a balanced approach in that it involves both affirmative applications from interested individuals for certain posts and nominations by research-related bodies that are impressive in both quantitative and qualitative terms. Since they will be the ones who will be drawing upon the outcomes of the REF when making future funding decisions, that is, since the REF is primarily

³²See REF 2014, Summary of Responses to the “Consultation on Draft Panel Criteria and Working Methods”, March 2012, available at: <http://www.ref.ac.uk/media/ref/content/pub/summaryofresponses to the consultationondraftpanelcriteriaandworkingmethods/responses.pdf> (Summary of Responses).

³³See REF 2014, Units of Assessment and Recruitment of Expert Panels, at 5, REF 01.2010, July 2010, available at: http://www.ref.ac.uk/media/ref/content/pub/unitsofassessmentandrecruitmentofexpertpanels/01_10.pdf (Units of Assessment).

³⁴For the full list of nominating bodies, see REF 2014, Nominating Bodies, available at: <http://www.ref.ac.uk/media/ref/content/expanel/member/Nominating%20bodies%20Sep%202012.pdf>.

³⁵Units of Assessment, *supra* note 33, pp. 5–7, There is also provision for designated observers to assist in the process. *Id.*, at 5, The full list of panelists can be accessed at: REF 2014, Panel Membership, available at: <http://www.ref.ac.uk/panels/panelmembership/>.

³⁶Units of Assessment, *supra* note 33, at 6.

³⁷*Id.*, at 7, See also Criteria and Methods, *supra* note 5, pp. 4–6.

³⁸Criteria and Methods, *supra* note 5, at 14.

meant to serve their agenda, it is understandable that the higher education funding bodies will be the ones who will make the final appointment decisions for the REF. Sufficient internal and external mechanisms seem to have been put into place to ensure that other stakeholders will be able to inform these decisions. It should also be noted that panel membership reflects greater diversity than was the case during the RAE, though future improvements to the selection process have been suggested.³⁹

As to how panelists and assessors within particular sub-panels will engage with specific main panel criteria in light of the REF's generic assessment criteria, one will recall that REF main panels are allowed some degree of discretion when it comes to approaching assessment criteria and working methods. Main Panel C has "finessed" these criteria for its units of assessment for outputs, impact, and environment, and it has done so in a very detailed manner. Formally, for outputs, Main Panel C's clarification of the REF's generic assessment criteria "expands on and complements the generic criteria and definitions in Annex A of 'guidance on submissions', but does not replace them."⁴⁰ For outputs alone, Main Panel C's clarification, at over 600 words, runs to over a dense page of words.⁴¹

Given that the REF's generic assessment criterion for outputs in terms of "originality, significance, and rigor" is "world-leading,"⁴² one could certainly be forgiven for sensing that this language does not "interpret itself." But does Main Panel C's clarification actually do such a thing, that is, does it "clarify"? Or does it simply confuse matters and increase the space for disagreement and divergent opinions? Why not add a clarification to Main Panel C's clarification, *ad infinitum*? In the REF's Summary of Responses to the "Consultation on Draft Panel Criteria and Working Methods," stakeholders raised similar concerns, such as the "differences of style, meaning, concepts and level of detail [...] in the output criteria and level definitions provided by the main panels,"⁴³ and, with interdisciplinary research particularly in mind, the fact that an output that straddles different main panels would be assessed according to different main panel clarifications.⁴⁴

Within each panel, a series of quality control measures have been put in place. A key one of these is the calibration exercise that all panels must conduct. This is to be done at an early stage of the assessment to ensure that all panelists are consistently applying the assessment criteria.⁴⁵ Main panels will also monitor assessment

³⁹REF 2014, Analysis of Panel Membership (July 2011), available at: <http://www.ref.ac.uk/media/ref/content/pub/analysisofpanelmembership/Analysispanelmembership.pdf>.

⁴⁰Criteria and Methods, *supra* note 5, at 66, See *Id.*, at 3, "These descriptive accounts should be read alongside, but do not replace, the generic definitions." *Id.*, at 6.

⁴¹*Id.*, pp. 66–67.

⁴²Criteria and Definitions, *supra* note 10.

⁴³Summary of Responses, *supra* note 32, at 4.

⁴⁴*Id.*, See also *Id.*, at 19 (expressing related concerns).

⁴⁵Criteria and Methods, *supra* note 5, pp. 15–17.

outcomes as they emerge from the sub-panels and confirm that sub-panels consistently apply the assessment criteria.⁴⁶ This ongoing oversight is critical to the maintenance of quality standards both within and between sub-panels and will need to be rigorously undertaken to ensure that the outcomes of the REF are credible.

The question of rights of appeal is a straightforward one to address: there is no such right.⁴⁷ The REF has curtly addressed this issue as follows, without explanation: “[t]he funding bodies have considered carefully the question of appeals, and concluded that the absence of an appeals process does not make the assessment process any less robust.”⁴⁸ This may or may not be the case, one can only imagine how many appeals would be lodged if an appeals process of an even remotely liberal nature had been agreed upon but, it is unfortunate that the REF has not explained how and why it has found against an appeals procedure of any sort. It reminds one of International Court of Justice (ICJ) Judge Buergenthal’s critique of the ICJ’s casual dismissal of countervailing facts and argument in the 2004 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion: “[t]he Court says that it ‘is not convinced’ but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.”⁴⁹ This is all the more unfortunate when one considers that the REF has expressly stated that best practice for committees with REF responsibilities within higher education institutions is that such committees should give detailed feedback to staff who are not selected for submission and that this should be done independently and prior to formal submission to the REF.⁵⁰

To repeat, the absence of a REF appeals procedure may or may not be justified, but as United States Supreme Court Justice Brandeis once noted “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”⁵¹ Some more “sunlight” on the appeals question would have helped. After all, *quis custodiet ipsos custodes?*

4 Conclusion

The idea of an open, transparent framework for assessing research excellence in British higher education institutions is a good one, and the taxpayer should not have to apologize for expecting detailed information about how his/her taxes are being

⁴⁶*Id.*, at 15.

⁴⁷Assessment and Guidance, *supra* note 2, at 7.

⁴⁸*Ibid.*

⁴⁹Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 244, July 9 (Buergenthal, J., declaration).

⁵⁰Assessment and Guidance, *supra* note 2, pp. 39–40.

⁵¹Louis D. Brandeis, *Other People’s Money: And How the Bankers Use It* (Martino Publishing, 2009).

spent. Are they being spent “wisely”? Could they be spent “more wisely”? The REF seeks to give the public a picture which is not a totally clear picture, but it promises to be a decent-enough picture of this. Higher education institutions will be spending much of the rest of 2013 frantically tweaking their submissions, REF panels will spend next year formally assessing each submission with regard to outputs, impact, and environment, and the results will be public knowledge by the end of 2014. The effect that the results could have upon public perceptions of research excellence in law and other REF units of assessment could be significant indeed.

Chapter 36

Legal Education: Ideological and Institutional Perspectives

K. Sita Manikyam and A. Lakshminath

1 Introduction

Education is a means by which knowledge is transmitted and skills developed. Beneath what appears to be a relatively simple statement exist a complex matrix of pedagogic and cultural practices that inform, shape and give effect to what information is chosen and how it is understood, transmitted and received. University education in its widest sense is a whole-person process, where the focus is not so much in the teaching and learning of specific skills or training as it is on the cultivation of personal autonomy, intellectual independence and the development of life-long critical perspectives. At the very least, university education ought to strive to prepare people for a changing world by promoting the intellectual and analytical skills that will assist them in assessing choices about their lives. Thus, the influence of education extends far beyond the classroom to all aspects of a person's life.

Legal Education has long been the subject of an inquiry into its purpose and methods and the landscape of legal pedagogy reflect the diversity of interest it has generated. Recently there has been a focus on legal education within a wider knowledge context, examining the teaching and learning of law as part of the overall project of developing analytical and conceptual skills as exemplified in the whole-person process of University education.

Law exists not only as a form of concrete expression found in statutes and common law and as commentary in legal texts and journal articles. Law may be thought of as the expression of the approved rules of conduct which have been

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agreed upon in the proper manner by the proper persons in power. What counts as the ‘proper’ mode of law-creation is, of course, itself a matter in the control of the powerful’. Included in this definition of law is judge-made law since judges and the judiciary is ‘institutionalized as executive agents of social power. In that, they serve as adjudicators and arbitrators of legal rules and disputes. What is significant about the law as an expression of the social rules of conduct is that it is a joint expression of power and ideology.

The crucial question about the origins of law always relates to the power bloc behind the legislation; the nature of the problem this bloc wants to solve, the ideologies in which this problem is perceived and understood, and the political opposition to the proposed legislation. Law is a hybrid phenomenon of politics and ideology a politico-ideological artefact’. Teaching law in a cross-cultural and cross-experiential fashion, we make it matter to all our students. This, ultimately, reaches to the fundamental principles of higher education. We want to ensure that students develop those analytical, conceptual and other intellectual skills which will enable them to make better choices in their lives, to become better citizens and to determine their place in the world and their relationships within it. At the same time, we are also committed to legal education that is professionally as well as socially and culturally relevant.

These goals are not incompatible. Indeed, they embrace the idea that law be taught within the context of the society in which it operates. It is not difficult to contemplate teaching law which integrates differing perspectives and thereby challenges the perception of law as a single monolithic expression of social rules. In doing so we also more accurately reflect the reality, our students experience. Additionally, we also grant them a greater opportunity to take responsibility for their own learning using material and information that is more meaningful and relevant to them. Legal education should be intellectually stimulating, horizon expanding and participatory: something that matters for everyone.

2 Legal Education

Law, legal education and development have become inter-related concepts in modern developing societies which are struggling to develop into social welfare states and are seeking to ameliorate the socio-economic condition of the people by peaceful means. The same is true of India. It is the crucial function of legal education to produce lawyers with a social vision in a developing country like India.

According to Professor Arthur von Mehren, before Independence the Indian legal profession and legal education had not developed ‘a rationally functional approach to the problems of law and legal order’ and the ‘Indian legal education inevitably tended to evolve in patterns that emphasized rote memory. To impart information—not critical understanding—remained the goal of legal education’. Consequently, when India gained independence, ‘its legal profession and legal

teaching were thus not able to play the role they ought, by Western standards, to have played'.¹

There is now a deeper consciousness not only among the law teachers, judges and the enlightened professional lawyers but also among others, that law has to play a crucial and vital role in a democratic society, that law has to serve as a vehicle of economic and social change in a developing society and that democracy and respect for law and rule of law will be strengthened in India by promoting legal education and research in law. It is the desire of the people that lawyers should play an active role in rebuilding the Indian society. Consequently, several steps have been taken to bring in reforms in Legal Education to make it socially relevant.

2.1 Role of Universities

'Universitas majosorum et scholarum' signifies a body of masters and scholars. Universities are the true homes of culture (Newman) where knowledge is an indispensable condition of the expansion of mind and is the instrument of attaining it. Law being the first act of human wisdom the aim of legal education is to build able professionals and also to prepare responsible citizens.

2.2 Universities' Committees on Legal Education

Several Universities in a bid to improve legal education being imparted by them at the time took initiative to appoint their own committees for suggesting improvements therein. A very significant step taken in the direction of improving legal education was the appointment by the Banaras Hindu University in 1962 of a legal education committee, at the instance of Dean Anandjee, under the Chairmanship of the then Chief Justice of India, Hon'ble Justice B.P. Sinha.

Most, if not all, of the Indian Law Schools are not only under-staffed but also inadequately staffed. There are several reasons for this, First: low priority is accorded to legal education by the Universities. Second: there is imperfect understanding of the role of law schools. Third: the academic responsibilities of law teachers are not fully appreciated. Fourth: law schools and law faculties are both single department institutions. Fifth: it is generally believed that a practicing lawyer can deliver goods better than an academic lawyer. One of the maladies affecting the Indian educational system is the insignificant role played by the majority of staff members in the growth and development of the institution.

¹Pragati Ghosh, 'Essay on Legal Education in India', available at: <http://www.shareyouressays.com/116804/essay-on-legal-education-in-india>.

2.3 Three-Year-Six-Term LL.B. Degree Course

With the growing complexities of society, laws are not only multiplying but have also become complex. It is well-nigh impossible today to do full justice to the law courses in two years of full-time instructions, far less to train law graduates for various careers that are open to them. This fact was recognized as early as in 1948 by the Radhakrishnan Commission and, ever since then, there is complete unanimity of the view that a 3-year period is the minimum required.

2.4 Response to the Banaras Scheme of Legal Education

The Banaras Scheme of 3-year law Degree Course was described by the Sinha Committee as ‘a pioneer effort raising the standards of legal education’ and as one ‘in the right direction for the improvement of the standards of legal education’. These developments have had a tremendous impact on the negotiation which Dean Anandjee was having with the Ford Foundation for further financial assistance to improve legal education at the Banaras Hindu University. They granted a sum of \$240,000 to the Law College for inviting visiting professors, sending its teachers abroad for training and for the purchase of foreign books.

It is encouraging to note that the Mahajan Committee (Punjab University), Gajendragadkar Committee (Delhi University) and Sinha Committee (Kerala University) have made suggestions analogous to the Banaras scheme for the improvement of legal education.² The next significant step in the direction of improving legal education was taken by the University of Delhi. In 1963, the University appointed a Committee under the Chairmanship of Chief Justice P.B. Gajendragadkar to make recommendations for a thorough re-organization of legal education in the University. The Committee in its report in 1964 insisted that the ‘aim of the legal education which Universities impart to students is not merely to make our citizens more cultured and liberally educated in the broad features of the law, but also to produce citizens who will follow the profession of law’. The Committee advocated a very broad view of the ‘legal profession’.³

The legal profession in this broad sense is a comprehensive concept and it includes not merely practice in courts, but also covers law teaching, law research,

²Anandjee, ‘Dean’s: Report response to the Banaras Scheme’ 1(I) *The Banaras Law Journal*, 1965, pp. 1–32.

³The Committee observed that, ‘We feel confident that if senior, well-qualified and experienced teachers are attracted to such National Law Schools and are offered appropriate remuneration and are vouchsafed other essential facilities, it would be possible to revolutionize legal education on healthy lines without delay. Like law itself, the teaching of law would make progress by experimentation and the method of trial and error which can be adopted in National Law Schools with small body of well-chosen students without external hindrance or impediment will ultimately serve the purpose of bringing about a new pattern of legal education in this country’.

administration in different branches where law plays a role; and in fact commercial and industrial employments and all other activities which postulate and require the use of legal knowledge and skill which adopt legal process also fall within its scope. The Committee went on to observe:

The legal education... is intended to be given to students who expect to follow one or another branch of the legal profession, and its aim would be to make the students of law good lawyers who have absorbed and mastered the theory of law, its philosophy, its function and its role in a democratic society.

Other recommendations *inter alia* made by the Committee were: The library of the Law Faculty should be equipped with all the necessary legal literature; some practical training is necessary for a law graduate wishing to enter the profession of law; a Council of Legal Education should be established; three or four model National Law Schools should be established which can attract dedicated and eminent law teachers and where experiments may constantly be made in newer methods of legal education.

3 Clinical Legal Education

There is a growing recognition in recent years that knowledge of the law is best understood in the context within which it operates in our complex society. This new approach to the study of law brought forth the concept of 'Clinical Legal Education' into limelight as a means of making legal education system more socially relevant and professionally significant. Clinical Legal Education has now become an integral part of the curriculum in undergraduate programmes of law and is placed high on the educational agenda of many reputed law schools and Universities throughout the world. In the U.S.A., which is regarded as the home of clinical legal education, 90% of law schools use some form of clinical approach, and the law school clinic is firmly entrenched as an important vehicle through which instruction is given in the theory and practice of law. Similar developments have taken place and are now taking place in Australia, Canada, India, Malaysia, South Africa and the South Pacific. In Canada, and more recently in Australia, the value of clinical methods has been recognized and praised in governmental reviews leading to the expansion of such programmes in law schools.

Changes in the law syllabi particularly in 5 year Law course have been made at the behest of the Bar Council of India (BCI) and the University Grants Commission (UGC) so as to incorporate 'practical training' component into the law school curriculum, which for the most part grew out of the clinical education movement. Moreover, the recent reforms in legal services delivery in India, such as community-based informal alternative dispute resolution forums, known as 'legal aid camps' or 'Lok Adalat' warrants substantial support from law school clinics for their effective functioning. Despite its growing importance, the clinical system is not getting much support and encouragement from law schools, Universities, law

faculties and the legal profession. This indifferent attitude is mainly attributable to the lack of proper understanding and misconceptions about the role and content of clinical legal education among the legal educators, law students, law faculty, members of the bench and bar. Dissemination of proper knowledge and sensitization of students and the faculty on the above aspects is, therefore, an imperative necessity to secure active student participation, faculty involvement and the support from Bar and Bench in clinical activities.

The term Clinical Legal Education, therefore, refers to learning by doing the types of things that lawyers do. It enables students to take on real clients' problems and work with them with the obvious goal of equipping the students to perform the variety of roles which lawyers are expected to play in our society. It is a system designed to facilitate the students to 'learn the law through experience' and directs the students to make an attempt to understand the theoretical and operational parameters of legal doctrines and statutory principles and the techniques of applying them in actual practice and real life situations. The students gain these practical insights through participation and undertaking certain clinical projects designed and organized by Law School Clinics.

Clinical legal Education and Practical Training are often confused with each other. The use of training techniques with nothing other than skill development in mind would be seen as practical training, but not clinical in its true sense. On the other hand, clinical techniques make the students capable of learning far more than skills and can develop a critical and contextual understanding of law as it affects people in society. Clinical experience in law school thus offers a unique opportunity for students to learn under supervision, not only about the professional skills used by lawyers, but also the role of the law and legal profession in society.

Clinical legal education integrates both 'doctrinal' and 'empirical' approaches in the study of law with a view to secure more effective student participation in learning the law. Hence, it is quite different from traditional legal education. The lecture-seminar methods so common in the education of law rarely involve students in the real or realistic experience of the law in practice. The study of law through the traditional approach of analyzing legal doctrines and precedents and the conventional lecture and discussion methods are based upon 'teacher-centred' learning approach and have proved themselves inadequate in making the students participate actively in the learning process. The 'case study' method pioneered by Christopher Langdell and others at Harvard Law School in the last quarter of the nineteenth century is also of limited value. Under the Langdellian method, students concentrate on appellate decisions, analyzing them and identifying principles upon which they were made. The result of lecture-seminar and case study methods is fundamentally limiting as students are largely passive recipients of knowledge, relying on an account of the law by an 'expert' in that field supplemented by periodic involvement through the production of assignments and tutorial discussion.

In India, there is no proper forum or an umbrella organization such as Clinical Legal Education Organization (CLEO) in U.K., Clinical Legal Education Association (CLEA) in U.S.A., Association of American Law Schools (AALS), the Australian Clinical Education Association. All these organizations are providing a

forum for the law teachers who are interested in a clinical approach to discuss the work together and share the experiences amongst them. They are further monitoring and playing a supportive role to the clinical legal education programmes in their respective countries. Such kind of initiative is very much needed in India too.

The above problems therefore need to be addressed in a proper manner in an appropriate forum by all concerned, be it the BCI, U.G.C., Central and State Governments for evolving an effective clinical methodology and integrate it with the law curriculum so as to achieve a fair balance between the doctrinal and empirical goals of legal education. This need has been emphasized by Professor Madhava Menon, the pioneer of clinical legal education movement in India, in the following words' clinical education can in the future open up the social action role of legally trained persons'.⁴

4 Legal Education and Techno-Science Challenges

The advances in recombinant DNA engineering and Micro-chip Technology have been spectacularly wide ranging and relate to almost every area of human life. Advances in cyber-technology give rise to a whole variety of technologies and underlie the 'promise' and 'perils' now of new forms of emergent nanotechnologies posing a serious challenge to the Legal Education. The emergence of Information Technology and Biotechnology is a decisive transformation that marks globalization. The contemporary world stands transformed in several ways by the revolution in microchips and integrated circuitry. It enables patterns of time-space compression, a defining feature of contemporary globalization. It makes real the hitherto unimaginable advances in genetic sciences and strategic biotechnologies. Advances in recombinant DNA technologies and integrated circuitry depend wholly on revolutionary techniques of artificial intelligence.

This development provides a driving force for the global emergence of trade related market friendly human rights and human capabilities. This leads to movements towards redefinitions of impoverishment. Poverty is no longer identified in terms of material deprivation but in terms of access to information or to Cyberspace enhanced human capabilities. The new North is Cyber-rich and the new South is Cyber poor, thus marking what is known as digital divide.

The emergence of Information Technologies has facilitated the widespread privatization of Governmental functions in welfare administration, health, education, finance, business, industries etc. Digitalisation of the world provides time space for increased and voluminous solidarity among the legal fraternity. These also give birth to the formation of techno-science-based strategic industries that resent and often reject state and international regulation and generate new forms of

⁴G. Mohan Gopal (ed.) *N.R. Madhava Menon's Reflections on Legal and Judicial Education*, (2009), pp. 133–155.

techno-politics. Together, these constitute a genomic materiality of globalization (little noticed in social theory narratives of globalization) contributing to the formation of ‘New World Order’. Biotechnologies, united in the pursuit of reductionist life sciences—where ‘life’ is no more than information open to techno-science codification, manipulation and diverse techniques of mutation and reproduction—fall into several domains of law and technology. Agricultural biotechnology, fostered by agribusiness, promises food for all; pharmaceutical biotechnology promises health for all; industrial biotechnology promises sustainable development for the world and the human genome projects, among other things, now promise new possibilities in therapeutics, health care and benign human cloning.⁵ Managing globalization and massive explosion in scientific and technological knowledge and innovations is impossible without an ethical underpinning based on values shared globally. The belief that biotechnology provides unprecedented vistas of human progress is not just media hype; its practitioners, in all parts of the world, live by it. The Law Schools must invariably keep in mind the above-mentioned advances in techno-science while formulating curriculum and promoting pedagogic skills and ideology. These developing technologies must be addressed by the Law Educators.

5 Critical Studies—Post Modernist Perspective

We seek to draw attention to the formative role played by legal education in the development, not so much of what lawyers think, but rather of how lawyers think.⁶ Law as an academic discipline is more than a body of substantive principles. It is set in a particular institutional context, and as such legal education necessarily entails not only the transmission of ideology but also the teaching of specific skills that reflect the particularity of the ‘legal method’. It can be argued that these skills simultaneously reflect and produce a normalized lawyer’s way of thinking that in turn re-affirms the complicity promoted within the passivizing classroom environment and perpetuates the prevailing legal ideology itself undermined within the critical commentary.

There is an intimate relationship between the processes of education, the transmission of knowledge, the deployment of training and the exercise of power. In so doing, it will uncover the complex juxtaposition between legal ideology and legal method that underlies the operation and teaching of law as an academic discipline. Juridical systems are permanent vehicles for relations of domination and polymorphous techniques of subjection.⁷

⁵Upendra Baxi, *Future of Human Rights*, (Oxford University Press, 3rd ed., 2012).

⁶Ian Ward, *Introduction to Critical Legal Theory*, (Psychology Press, 2nd ed., 2004) at 155.

⁷Foucault, 1976 b: 24–25.

6 Alternative Adjudicatory Mechanism—Challenge to Legal Academia

The prospects are bright both for teaching and research in the application of computers. Interdisciplinary studies in the area of law and computers would provide a meaningful interaction between the legal academics and technologists. Computers can be best used in two ways to assist the legal profession. One is the information retrieval system which can be developed with the help of law faculty and the computer science department. The second area in which computers can very usefully be employed is artificial intelligence system with which several types of stereotype cases can be decided with the help of computer programmes to arrive at more objective and quicker decisions. The law faculty should actively engage in collaborative research with the computer science department. This needs to be pursued vigorously to design meaningful computerized programmes as alternative dispute settlement mechanism.

Access to justice requires a just process, which includes, among other things, timeliness and affordability. A just process also has ‘transparency’, which means that the system allows the public to see not just the outside but through to the inside of the justice system, its rules and standards, procedures and processes, and its other operational characteristics and patterns so as to evaluate all aspects of its operations, particularly its fairness, effectiveness, and efficiency.

Cornerstones for access to justice include lawyers, free dissemination of law and the judiciary. Now, lawyers are not practically accessible to all individuals in the society owing to structural failure of the legal system. Law develops its complexity with the society; nonetheless, dissemination technology of law is not as developed as sufficient to satisfy demands of the society. The court is in a limbo in which impartiality and fairness to all parties constrain its role to assist unrepresented litigants.

Disruptive legal information technology and emerging Electronic Legal Information (ELI) may arise as the 4th cornerstone in face of the challenges, the other three being (i) Lawyer (ii) dissemination of law and (iii) Judiciary. Electronic Legal Information (ELI) refers to (i) an integrated Electronic Law governing civil procedures and other areas of substantive law, (ii) electronic legal document filings and evidence and (iii) electronic court case status information. ELI is transforming the existing cornerstones to their virtual existences, which take on the new capability to face the challenges of high costs, delay and complexity.

To promote access to civil justice, disruptive legal information technology should be adopted and a positive right to access ELI be established. For unrepresented litigants, the use of ELI will put them in a better position to assess if legal assistance should be sought or it would be better to remain unrepresented. Should they choose to be unrepresented, ELI provides ease of reference to law and integrates law from their perspective. For represented litigants, they will have a greater access to information concerning activity of court proceedings and they will be in a better position to push progress with the availability of case status information and electronic court document filings.

7 The Practice Theory of Law and Legal Education

The Practice theory of Law (PTL) offers a fresh look into the possibility of legal knowledge, by enabling the depiction of legal norms in a practice that combines the two levels of thought and action. This possibility opens up when we move beyond the two currently dominant legal theories concerning the possibility of legal knowledge, namely conventionalism and essentialism. This move requires that one leave behind the philosophical assumptions that underpin these two theories and advance a new account of knowledge, one that connects it with the idea of a practice of judging which is normatively constrained by reasons or, to say the same thing in different terms, reflexive. Pragmatic rationalism, the new account that has been put forward here, argues that nothing can be known unless it can function as a reason or a constraint within such a practice. Unless, for instance, a norm imposing penalties for tax evasion can function as a constraint for a judgment purporting to determine fines within a legal system, that norm cannot be known. As a result, reflexivity, or the ability of agents to think of reason, becomes a key concept for knowledge.

Judging is neither just acting nor merely thinking, for otherwise, thoughts would become either indeterminate or unintelligible. Instead, it is an integrated instance of thinking and acting, or a practice, which asks for justifying reason with respect to any cognitive move performed within it.

In contradistinction to both interpretivism and the conventionalist account of law, the PTL argues that law is a constraint-generating concept. PTL seeks to demonstrate this claim by illustrating the reflexive character of legal practice as consequential upon its responsiveness to reasons (legal reasons). As a result, the most important task of PTL is to develop a working conception of legal practice. In doing so it must defend the normative character of legal reasons against the pitfalls of both the interpretivist and the conventionalist accounts of law with an eye to avoiding losing hold of the reflexivity of legal practice.

PTL encourages a shift from the formal to the substantive features of the law. Owing to the opening up to legal phenomena to the argumentative practice that underpins them, the legal form may be explained as depending on the concrete substantive principles that are at work with respect to particular situations. In this context, form loses its ‘uniqueness’, for it becomes possible to identify more than one formal or institutional arrangement as suitable for serving the same underlying principle or cluster of principles. Flexibility of form resists formalistic analyses of legal phenomena, especially those that attempt to specify exhaustive sets of criteria for the validity of legal rules, usually by offering a complete list of legal sources within a legal system.

8 Strategies for Institutional Involvement

It is not just that the juridical legitimization of power masks the disciplinary operation of techniques of case analysis and problem-solving upon the ‘active’ student learner. Rather, it is also the case that the disciplining effects of this legal method actually help perpetuate the juridical representation of law as an expression of the rational, neutral and coherent exercise of power.

In Foucaultian terms, therefore, the delineation of ‘law as an academic discipline’ requires not only the promotion of a specific ideology but also the deployment of a catalogue of disciplinary techniques that are in themselves inextricably bound up with the perpetuation of knowledge.

Sixty-six years of postcolonial Indian legal education (at least in the chronological sense as something that occurs after decolonization) have merely ‘modestly developed traditions of legal scholarship’. This is so because law teachers of yesteryear and also ‘specialist’ colleagues in other allied social science and humanities disciplines have by and large failed in building a research project in law with distinctly Indian problems and possibilities and the vice like grip of doctrinal legal analysis has rendered teaching and learning law a self-referential enterprise in the interpretation of rules. Indian Legal scholarship, on this view of it, remains overwhelmingly exegetic and dismally doctrinal, content merely with ‘commentaries’ which merely chart the movement of doctrinal legal trends across various fields. As a result, legal education in India has not been successful in going beyond meeting the minimal requirement of producing ‘legal technicians’ for a range of legal markets. Overall, legal education in India has been unable to respond holistically and meaningfully to contemporary challenges.

In any further pursuit of ‘enculturing law’, we may perhaps want to rather anxiously revisit our distinctively very own ways of structuring pedagogic violence. This by no means an easy terrain but then no talk concerning ‘enculturing law’ remains worth the self-naming outside the violence of the founding myths and lived realties, whether styled with Walter Benjamin as the violence of pure means (divine violence) or with Derrida the ‘foundational’ and ‘reiterated’ violence of the modern law’s multifarious and poignant incarnating regimes of illegalities. Some ways of imagining the tasks of doing histories of legal education in India, as well as the globalizing Global South, and the future histories of ‘enculturing law’, may still carry messages of hope in all their constitutive ambiguity.

A review of the functioning of various authorities connected with legal education amply demonstrates that there is neither harmonious coordination nor the effective determination of standards in law schools because of multiple controls. The present inspection and accreditation processes do not ensure quality assessment or transparency. The composition of Legal Education Committee should be so changed so as to adequately provide representation to eminent law teachers, law scholars and educationists. Law teachers do need exposure to some better teaching techniques help build their capabilities. The National Law Universities should come forward to provide continuing education and training to the teachers both in

pedagogic skills and research techniques. Academic staff college experiments are not yielding good results. Legal scholarship from the profession should be encouraged by using their expertise in law education both clinical and court centric. Attendance and continuing assessment of students should form part of the examination system and the ranking. The Universities must develop the law curriculum taking into consideration the fast moving developments in Science and Technology, Management, Corporate accountability and Alternative Dispute Redressal Mechanism. The traditional Universities should give as much freedom as possible to the law faculties to introduce the changes in the curriculum without losing much time.

9 Conclusion

Pedagogical agents offer the advantage of an almost-human element that can be more consistent, more efficient and more economical than in-person human trainers through Advanced Video Attribute Terminal Assembler and Recreator (AVATAR) Technology.⁸ University must develop AVATAR Technology for their classroom and court experiments. AVATAR Technology enables a variety of different modalities for teaching and learning online. A simple AVATAR can serve as a one-on-one coach or tutor in an asynchronous, e-learning programme. A more advance pedagogical agent guides learners through courseware, explains and demonstrates techniques, allows multiple tries and offers hints and feedback. AVATAR-based course can be modified or updated to target training for different purposes. Teachers, educators and Law Schools need to understand that virtual worlds, like other social media, are here to stay and that these exciting forms of media are not a threat to formal education. The genuine conversation and participation that virtual worlds encourage is a step toward more authentic learning for all students and supplement the classroom and Courtroom work including simulation exercises in Mediation, conciliation and Arbitration areas. AVATAR software and hardware need to be developed by experts both from law and computer science departments through Artificial Intelligence and Multi-user Domain.

The law faculties in the Universities should play an important role in introducing new courses and implement them immediately. The traditional Universities must come forward to revitalize the practical training programme and to introduce the clinical legal programme and effectively monitor the implementation of these measures by introducing credits for active participation in the programme. Bar Councils must come forward to play a significant role in streamlining the practical training and clinical legal education in Law Colleges while granting recognition and approval of affiliation. Legislatures should come forward to establish and develop Alternate Adjudication Mechanism.

⁸Naushad Hussain, *University News*, Vol. 51, 2013.

According to Steven Freeland of Sydney, the next generation of lawyers will need to operate within the context of increasingly multilateral legal regulation, even over areas of law that have traditionally been regarded as within the exclusive domain of the sovereign State. Lawyers will need to become more multi-disciplinary and flexible in their training. As the world becomes smaller due to technological advances, it also becomes more complex and we have to address these demands of the next generation. Several courses which were optional have to be made compulsory. He concludes that:

the challenges of the twenty-first century are daunting for humankind. Rapid developments in technology, changes in the geopolitical climate, and recognition of issues of global concern, among other things, will demand that the legal processes respond in an appropriate manner.⁹

This is particularly relevant when the nature of law, legal institutions and law practice are in the midst of paradigm shift.

⁹Quoted by Justice M.J. Rao in his inaugural address on ‘Challenges and Perspectives in a Globalised World’, Seminar on Legal Education at Hyderabad on 23rd and 24th June, 2007.

Chapter 37

Problems and Challenges Bedeviling Law Teachers in Developing Societies

Olaolu S. Opadere

1 Introduction

Teachers, whether of law or other subjects, are saddled with the responsibility of systematic presentation of facts, ideas, skills and techniques to students. In ancient times, this responsibility was considered sacred¹; and to the teacher, it was a rare privilege. The term ‘law’, however, is not easy to define, as scholars have often disagreed on what its appropriate definition is.² For the purpose of this chapter,

¹Ryan Kevin, ‘Teaching’ Microsoft Corporation, 2009 [DVD], Redmond, WA, Microsoft Corporation, 2008.

²C. Gordon Post, *An Introduction to the Law* (A Spectrum Book, Prentice-Hall, Inc., 1963) pp. 7–10.

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however, law (*vis-à-vis* teachers) is used in its broadest sense, particularly, in terms of all that a student needs to learn in order to become a law practitioner,³ from institutions of higher learning. The problems and/or challenges militating against law teachers in developing societies in the discharge of the sacred responsibilities they are saddled with are nonetheless enormous, such that it may be impracticable to dwell on all in this brief chapter. However, those to be considered for this purpose could be broadly categorized as follows: structural and infrastructural problems; personnel challenge; decline in educational culture; and governmental influence. It is important to address the above-mentioned categories of problems confronting law teachers, in view of the magnitude of expectation from law practitioners who end up as products of law teaching.⁴ Furthermore, as a result of law teaching, it is expected that students would be able to relate to whatever subject matter is placed before them in a purposeful way and develop a lifelong deep learning approach.⁵ For the student to achieve this, it has been identified that there must be sufficient academic challenge, formidable staff and student interactions, enriching educational experiences, supportive and conducive learning environment, among other critical factors.⁶ This chapter shall evaluate the problem-categories identified above vis-à-vis how they have become inhibitors to the law teacher in the achievement of the teaching objectives, as identified. This evaluation shall be done using Nigeria as case study of a developing society, in which the identified problems/challenges have become a serious concern. It is certain, however, that with an adoption of a pragmatic approach to confronting these challenges, law teachers in this clime shall be able to fully accomplish the objectives of their profession.

³See Bryan A. Garner (ed.), *Black's Law Dictionary* (WEST Thomas Reuters, 9th ed., 2009) pp. 962–963.

⁴J.B. Daodu, SAN, 'Speech by J.B. Daodu, SAN, President of the Nigerian Bar Association at the Inauguration of 4 Committees' in Abuja, Nigeria, on October 22, 2010. Daodu observed in respect of Legal Education (Reform) Committee, thus: 'The future of the legal profession (Bar and Bench), particularly its survival, is linked to the quality of legal education received by a lawyer or law student in his formative years, precisely in the University and the Law School. The complaints that standards of every facet of legal practice is falling is real. The solution does not just lie in vowing to arrest the deteriorating situation. There must be an assessment of the scope of the damage to our legal education system before we can mete out remedial action....', available at: <http://www.nba.org.ng/web/speech-by-j-b-daudu-san-president-of-the-nigerian-bar-association-at-the-inauguration-of-4-committees.html> [accessed on February 4, 2013]. It is of concern here that since 2010 when the Committee was established, the outcome has not yet been publicized, or particularly, brought to the knowledge of law faculties and the Nigerian Law School, for their observation and instruction.

⁵Susan Douglas, 'Student Engagement, Problem Based Learning and Teaching Law to Business Students', 6(1) *e-Journal of Business Education & Scholarship of Teaching*, 2012, pp. 33–47, available at: http://www.ejbest.org/upload/eJBEST_Douglas_2012.pdf [accessed on January 15, 2013].

⁶Ibid. See also Australian Council for Educational Research (ACER) 2007–2009, 'Australasian Student Engagement Report'. available at: <http://www.acer.edu.au/research/ausse/reports> [accessed on February 1, 2013].

2 The Ideal Minimum

‘Ideal’ literally depicts an excellent or perfect example of something to which people aspire, as being worth trying to achieve or obtain.⁷ In the context of this chapter, the ideal is considered simply in terms of the law teacher, the law student and the law school setting. In other words, the basic tolerable minimum expectation from a law teacher; expectations from a student who has been or is being tutored by that law teacher; and the minimum environmental requirement in which such law teacher dispenses his responsibility, and where such student learns the law. Law teaching in this scenario ought to fulfill some basic expectations, such as transmission of knowledge, organizing student activities and genuinely making learning possible.⁸ It is worth reiterating that a lawyer can only be as good as the system of legal education that produced him. Hence, legal education—academic as well as vocational—is a vital ingredient that affects the quality of the justice system and the role of lawyers in the political, economic and social development of the country.⁹ In this scenario, the expectation of the law teacher as well as the student transcends that of merely ‘covering’ the entire syllabus; there must have indeed been a transmission of knowledge, in an atmosphere where the class has not merely engaged the student, but the student has also engaged the class. In other words, the student must have felt the impact of class, while the class also felt the impact of the student. Furthermore, in this scenario, the teacher is not the only participant and the dominant monologist, in an effort to ram all that is possible into the brains of his students; rather it is an atmosphere of in-depth engagement and responsive interactions.

As acknowledged by Douglas, higher education, such as is required in a law school/faculty of law, is such that should teach students to analyze ideas or issues critically; develop students’ intellectual/thinking skill, and teach students to comprehend principles or generalizations.¹⁰ As a fact, this atmosphere being described is such that the law teacher is not intimidated or embarrassed by attempted or actual

⁷Sally Wehmeier (ed.), *Oxford Advanced Learner’s Dictionary* (Oxford University Press, 6th ed., 2000) at 592.

⁸Susan Douglas, *supra* note 5, at 34.

⁹See M.O. Onolaja, JCA, ‘Problem of Legal Education in Nigeria’, available at: <http://www.alimiandco.com/publications/ACCREDITATION%20AND%20LEGAL%20EDUCATION%20IN%20NIGERIA.pdf> [accessed on January 21, 2013]. The author (then a Justice of the Nigerian Court of Appeal) further noted, rightly so, that ‘the quality of judicial decisions and the coherence of the reasoning underlying a judgment depend upon the quality of the argument presented to the Court and upon the ability of the Judge. All these depend upon the quality of our legal education’.

¹⁰*Id.*, at 38, wherein she also referred to P. Ramsden, *Learning to Teach in Higher Education* (Routledge Falmer, 2nd ed., 2005) at 22; Therein, critical thinking is defined as the ability to do some or all of the following: ‘identify central issues and assumptions in an argument, recognize important relationships, make correct inferences from data, deduce conclusions from information or data provided, interpret whether conclusions are warranted on the basis of the data given and evaluate evidence or authority’.

contradictions from students; rather, the teacher is able to guide/help the student's rationale unto assuming a proper shape and perspective.¹¹ This, expectedly, prepares the students for a lifelong learning process and problem-solving in the law profession as well as other spheres of life.¹² It is, however, certain that this ideal scenario is not merely a utopia, but actually achievable, when the right factors are in place, in the right proportions. The fact that this ideal is achievable or near-achievable is the reason why many Nigerians send their children, wards, and even themselves to perceived developed or educationally better/advanced countries to study, rather than pursue their academic goals in their home country. These factors include the psychological and physical preparedness of the law teacher; structural and infrastructural availability; enhancement of societal and educational culture; commitment on the part of government, among others.

3 Factors Militating Against the Ideal

3.1 Psychological and Physical Unpreparedness

Conversely, the preparedness required in this respect entails much. First, it suggests a law teacher who has not merely taken to the teaching profession for lack of a better thing to do but as of choice. Unfortunately, the reality of the Nigerian society (typical of a developing society) is that many have taken to teaching, including law teaching, for want of a decent job, without the required passion or zeal whatsoever. It is obvious that most in this category lack the requisite psychological and/or physical preparedness; consequently, they are always ready to quit at the slightest prompting. One of the numerous examples of easy quitters is seen in academics, even at professorial level, abdicating their professed 'primary constituency' for politics; even at the lowest wrung of the ladder—which was once considered menial

¹¹Gerald F. Hess, 'Improving Teaching and Learning in Law School: Faculty Development Research, Principles and Programs', 12(1) *Widener Law Review*, 2006, at 455, where the author observed that: 'Many college teachers report that student evaluations provide useful feedback that leads to improvements in teaching. A legal educator concludes that written student comments on evaluations can provide teachers with formative feedback and helpful suggestions for improvement in areas such as the teacher's clarity, delivery, organization, punctuality, fairness, demeanour, empathy and availability outside of class'.

¹²Tahir Mamman, 'The Globalization of Legal Practice: The Challenges for Legal Education in Nigeria', being paper delivered by Dr. Tahir Mamman—Director General, Nigerian Law School, at the 2nd Annual Business Luncheon of S.P.A. Ajibade & Co, Legal Practitioners on Thursday 19th November 2009, available at: <http://www.nigerianlawguru.com/articles/general/THE%20GLOBALISATION%20OF%20LEGAL%20PRACTICE.pdf>, at 23 [visited on February 4, 2013]; The author corroborated the fact that 'the aim of legal education as noted earlier may be a process of 'transmitting knowledge and inculcating a method of thinking' by which each student should in the course of his studies obtain two things: a general survey of his field, and a detailed map of selected areas, selected by him or for him'.

and berating of persons of academic caliber.¹³ It would be different if academics merely proceed on leave (as may be appropriate) away from academics for a brief moment, to revert later; rather than complete abandonment, which is presently being experienced. This point is considered critical because there is at present a deluge of academics—doctors, professors, etc.—serving full time at various levels in the government circles. If academics with several years of doctoral and post-doctoral experience and chaired professors have now taken to politics, it means hope for thorough and professional teaching, as well as the ideal law teaching being advocated, is virtually lost. Therefore, a law teacher who would make great impact is one who is committed and passionate about teaching, and who considers it a ‘calling’ than a mere vocation. In this regard, even if he has cause to foray into a field like politics or any other, it is for the purpose of making the experience gained therefrom count for himself and his students ultimately, and not to abandon them entirely. In effect, such and every opportunity an academic has to go out of the citadel of learning is considered an opportunity for further learning, recreation and ultimately improve his academic content, for the benefit of many. Furthermore, as Hess observed, it is a misconception that if teachers know the content well, they can teach it well. However, while knowledge of the subject matter is an essential element of good teaching, it will lead to effective teaching and learning only if coupled with pedagogical skill.¹⁴ Therefore, the requirement of preparation implicitly suggests that both the institutional employer as well as the law teacher (employee) have a mutual understanding that the teacher would be, first prepared from the outset, and then constantly upgrade his preparedness, on/and for the job. This indicates that law teaching must be tasking enough and at the same time considerate to allow the teacher time for constant upgrading of or re-creating his materials/resources, in order to meet the enormous requirement on the law teacher, in this evolving dispensation.

Another element tied to this is that many faculties of law have no provision for the improvement and intellectual upgrading of their staff. By this, it means the law school does not encourage their academics to attend conferences, at least once or

¹³For instance, a Professor becoming a counsellor in the local government, or becoming a special adviser to a state government, or local government chairman. For purpose of clarity, this is not to suggest a condemnation of academics being interested or actually taking part in partisan politics. The point being made here is that teaching as first love, and the passion it requires is long lost. What is left is substantially a matter of convenience.

¹⁴Gerald F. Hess, *supra* note 11, at 447; the author noted that ‘Another misconception is that good teachers are born, not made. However, research shows that successful teachers learn how to teach and continue to improve their instructional skills and pedagogical knowledge by working on them over time’. See also Okom M.P. and Udoaka E.E., ‘Recruitment of Law Academic Staff in the twenty-first Century’, being a paper presented at the 43rd Annual Conference of the Nigerian Association of Law Teachers (NALT) Legal Education in the twenty-first Century, held 17–20 May 2010, at Kogi State University, Anyigba; to the effect, among others, that ‘not every recipient of learning, knowledge, instruction and information has the capacity to dispense it. And the quality of knowledge dispensed is directly related to the quality of those dispensing it’, at 568 of the Proceedings.

twice annually; take advantage of fellowship opportunities; etc. In addition, when the teachers show interest in these development ventures, the institution is not disposed to giving any financial and/or moral support whatsoever. Thus, many such staff only struggle at their own expense to improve themselves, which consequently leaves such individuals with dwindling or virtually exhausted commitment to such law institution. What most of the law faculties are concerned about is that lecturers teach student by all means; howbeit, recycling old/obsolete materials year after year, and graduate them, in order to proceed for the law school¹⁵ programme. Reisman made certain propositions in respect of designing curricula for legal education.¹⁶ It interests one to observe that while he propositioned for legal education's development, over three decades ago, at a time the American society could be said to have attained certain landmark accomplishment, it is disheartening that Nigeria and other developing societies are yet to grapple with some basic minimum requirements, now in the twenty-first Century. As if to say, we are yet to appreciate the rudiments and essence of sustained legal education.

3.2 Personnel Challenge

This challenge, on one part, addresses the numerical inadequacy of law teachers in a good number of institutions, which in effect gives rise to very poor student-teacher ratio. The suggested ratio¹⁷ is 20 to 1, while what is obtainable in some Federal Universities' Faculties of Law is about 50 to 1. A particular institution, with which this writer is very familiar, has an average of 350 students in each part¹⁸ in the faculty of law; and it is a usual occurrence to have a lecturer teaching more than one

¹⁵The Nigerian Law School is the central educational institution that moderates the examination that qualifies Nigerian Law graduates to becoming solicitors and barristers. The school is overseen by the Nigerian Council of Legal Education established by virtue of the Legal Education (Consolidation, Etc) Act, as contained in CAP L10, Laws of the Federation of Nigeria, 2004, at Section 1. Law undergraduates are required to successfully complete their LL.B degree programme first, before they would be eligible to proceed to the Nigerian Law School for its mandatory one-year Barrister-at-Law programme, which qualifies successful graduates therefrom to practice as Barristers and Solicitors of the Supreme Court of Nigeria.

¹⁶Reisman W. Michael, 'Designing Curricula: Making Legal Education Continuously Effective and Relevant for the twenty-first Century', 17 *Cumberland Law Review*, 1986–1987, at 834, available at: http://digitalcommons.law.yale.edu/fss_papers/756 [accessed on February 4, 2013]; There, the author reiterated that 'the formula I propose is quite simple—though its implementation can pose awesome problems. Curriculum and law school structure, as I have said, are tools for training decision specialists to perform indispensable decision functions in an industrial and science-based civilization in the next generation'.

¹⁷Being propositioned by the National Universities Commission—the body that has the responsibility, inter alia, of overseeing the activities of Nigerian Universities, established by virtue of the National Universities Commission Act, as contained in CAP. N81, Laws of the Federation of Nigeria, 2004.

¹⁸Whereas, there are five parts/levels—1 to 5—in the LL.B programme.

core course, across the parts, aside law electives (non-core courses).¹⁹ In other words, a law teacher may have more than 700 hundred students to attend to in a semester or session; who must be assessed and/or examined by theoretical examinations, without employing the use of multiple choice questions. This is indeed a difficult task: as a result of which tutorial system of teaching/learning has become virtually eroded, and teachers practically have no ‘spare time’ for their students. Linked to this also, is the fact that admission into the undergraduate law programme remains over-bloated, despite the increasing challenge posed to the personnel capacity. The over-bloated admission is caused by several factors, foremost of which is the desire by some University administrators (deans, vice-chancellors, etc.) to curry favour from recommenders of candidates.²⁰ It may be interesting to know that in the case of the said familiar institution, its student quota for the Nigerian Law School is 250, yearly; and this has remained so for about a decade. Nonetheless, admission remains bloated, and personnel capacity challenged. It goes without saying, therefore, in view of the constant overstretching of admission space, that classes are naturally overcrowded, with attendant consequences which shall be addressed shortly.

On the other hand, there is also the challenge of acquiring a doctoral degree in law, on law teachers, as a prerequisite to building a worthwhile career in academics. Without doubt, this requirement on academics is most laudable; however, there is a dimension thereof that poses great challenge on the law teacher. The reality in many Nigerian universities is that not many law teachers have the opportunity of proceeding on study leave, either abroad or within the country, for their Ph.D. As a result, many have to remain in their various institutions to pursue the programme—as ‘staff/student’, or as staff, while pursuing the doctorate in another Institution. Nonetheless, they bear their full load of work in their employer-Institution. It is common knowledge that every academic programme/degree is time-bound. In effect, when the candidate fails to complete the programme within the stipulated time, he/she stands the risk of termination of studentship. As a fact, this author is

¹⁹Faculty of Law Handbook (2006–2008), Obafemi Awolowo University, Ile-Ife, Nigeria, pp. 8–18; where the core Law courses are listed to include: Legal Method (Part 1); Law of Contract, Constitutional Law, Nigerian Legal System (Part 2); Commercial Law, Law of Torts, Criminal Law (Part 3); Land Law, Equity and Trust, Law of Evidence (Part 4); and Law of Business Association, Jurisprudence and Legal Theory, Long Essay (Part 5). There is also a list of restricted and special electives from which Law Students are expected to choose courses, in fulfilling the requirements for an LL.B degree. See also Tahir Mamman, *supra* note 12, pp. 9–11; R. Aduche Wokocha, ‘The Challenges of Legal Education in Nigeria: The Way Forward’ in Web Journal of Current Legal Issues [2008] 3 Web JCLI, available at: <http://webjcli.ncl.ac.uk/2008/issue3/wokocha3.html> [accessed on February 4, 2013]; where he also listed some of the courses enumerated above, as required for an LL.B degree, from the perspective and as customized by his own Institution/University; and Chima Umezuruike, ‘Reform of Legal Education and the Legal Profession in twenty-first Century Nigeria’, available at: <http://www.thenigeriabusiness.com/column7.html> [accessed on February 4, 2013].

²⁰See R. Aduche Wokocha, *Ibid*. It is also important to observe, as buttressed by the author, that some of the ‘favour currying effort’ is in order to please kith and kin, political office holders or University financiers; and sometime for financial and/or material gains.

witness to certain law teachers/colleagues in his Faculty, who, at certain points in their PhD pursuit (in the same institution) lost their studentship; simply because they were overburdened by the regular workload, and unable to cope with the pace required of the doctoral programme. Therefore, it is not unusual that such staff/students have divided loyalty between the timeous successful completion of the doctoral programme, and the success of their students—of which the latter is usually secondary. Connected to this is the fact that teaching counts only a little in the criteria for promotion, while the quality of teaching does not, at all. Hence the law teacher is required to research and publish, being one of the major requirements for promotion. Contrary to the proposition of Hess and others like him,²¹ the reality, most times, is that no matter how much and how well/excellently a law teacher teaches, it counts very little or not in respect of promotion. Therefore, the gratification a law teacher receives for a good job done at teaching is, most times, just the acclaim of his students, and nothing from the institution; which essentially does not lead the teacher anywhere, with respect to his teaching career.

Furthermore, another critical challenge on the law teacher is the requirement to partake in administrative/non-academic responsibilities.²² This could take the form of meetings, positions of responsibility, attending administrative meetings at various levels, processing of students' results, etc. all of which have no direct connection with teaching and research, expected of the law teacher.

The cumulative consequence of the above-enumerated personnel challenge is that law teachers resort to the easiest way of teaching, as much as possible. This could mean that law teaching would be shoddily done; quizzes, continuous assessment,²³ etc. as observed and proffered by Fines would be poorly conducted,²⁴ if conducted at all. As a result, law teachers would mostly resort to surface teaching rather than taking the students through in-depth, analytical learning, since they themselves may not be thoroughly prepared for any serious 'engagement.' Thus, many law teachers would merely go to the class to dictate old or even obsolete notes to the students rather than engage them in the actual learning process. The consequence is an endless ripple.

²¹Gerald F. Hess, *supra* note 11, at 451, where he propositioned that, 'Universities and law schools have traditions of supporting scholarship with summer stipends, course reductions, release time, and preferential scheduling. The same rewards can support faculty development and increase faculty members' incentives to work on improving their teacher. In academia, among the most significant rewards are tenure and promotion. Schools that are serious about the value of teaching excellence in tenure and promotion decisions will use the faculty development process to help faculty members succeed'.

²²Which in some respect is regarded as service to the university community, and which is only rewarded or counts for promotion, mostly at the professorial level.

²³Barbara Glesner Fines, 'Classroom Assessment Techniques for Law School Teaching', *Teaching and Learning Law Page*, available at: <http://www.law2.umkc.edu/faculty/profiles/glesnerfines/cats.htm> [accessed on January 21, 2013].

²⁴Ibid.

3.3 Structural and Infrastructural Challenge

This challenge is a conglomerate of numerous challenges, which is about the inadequacy or outright lack of some basic physical and organizational structures in the law faculty, which should enhance the productivity of law teachers.

The numerical strength of a law class has been mentioned above. It is worsened, however, by the fact that the lecture halls/theatres allotted to such large classes do not contain the number of students in issue. On several occasions, Law undergraduates have to hang around windows and the corridors, straining to hear what the teacher is saying; for the reason that the lecture venue is too small for the number of students offering a particular course. Worse still, the lecture halls/theatres do not have ready public address system facility in place. So, the students are usually at a loss in this circumstance, and the teacher also frustrated. Another dimension to the problem is that of poor maintenance culture, which has pervaded most developing societies; of which institutions of higher learning are not exempted. It is not an uncommon sight to get to a classroom or lecture theatre that should ordinarily accommodate a large class, such as mentioned above; only to discover that a great number of the fixtures such as chairs/seats, lightings, writing boards, louvers, fans, etc. have been damaged and remain unrepairs. Thus, the halls would appear big and sufficient on the outside, but certainly unable to perform the expected purpose, in reality. Furthermore, there is a huge lack of electronic learning facilities, which gives rise to virtually everything about teaching and learning of law still being done manually.²⁵ Sometimes it could be so embarrassingly bad, to such extent that teachers and students may be unable to communicate via as trivial as an email. In this regard also, teaching cannot be done via power point presentations or any other electronic means. Of course, this is usually a harrowing and exhausting experience for any law teacher so confronted. Further still, another ridiculous dimension is that when some of the electronic learning facilities are available, there may be protracted power/electricity failure,²⁶ or outright lack of it.

A further debilitating challenge to law teaching in this time is the sharing of offices by law teachers. It goes without saying that thorough teaching and research, as expected of academics, require utmost serenity of mind, focus and concentration; with distractions reduced to the barest minimum. However, where law teachers of diverse backgrounds and dispositions are forcefully cocooned—in the name of

²⁵*Id.*, pp. 4–5, Where Barbara G. Fines advocated the use of electronic devices in the teaching of law, as a way of facilitating and/or enhancing students' assessment and ability to learn. See also Joash Amupitan, et al., 'ICT in twenty-first Century Legal Education', being a paper presented at the 43rd Annual Conference of the Nigerian Association of Law Teachers (NALT), Legal Education in the twenty-first Century, held 17–20 May 2010 at Kogi State University, Anyigba, at 346 of the Proceedings.

²⁶Joash Amupitan, *Id.*, at 346, where the authors observed that, 'for ICT to be successfully used in teaching and research in Law, the provision of reliable infrastructure is a critical success factor. The infrastructure referred here includes a system that ensures regular and dependable power supply, uninterrupted internet access at critical locations of the campus, including staff residences, and a good network of computers'.

'office-sharing', it would in many ways debilitate their productivity to an incalculable extent. The same goes for residential housing for law teachers, as well as other academics, which at the moment is obviously not the priority of many institutions of higher learning in Nigeria. Consequently, each academic is in isolation and left to sort themselves out, in any way possible. Therefore, many end up in densely populated and noisy environments, which do not enhance or facilitate academic endeavours and productivity. Furthermore, part of the infrastructural challenge is the poor consideration accorded to students with physical disabilities. It is this writer's experience in the said familiar institution that students, particularly, with sight impairment have not been well treated. It is perceived that if an institution is inclined to admitting a student with such disability, it should be ready to either make concessions, or decline admitting such student, altogether. Unfortunately, sight-challenged students have been repeatedly admitted, and merely left to compete with other 'unchallenged' students, under a generally harsh academic/learning climate.²⁷

3.4 Decline of Educational Culture

Sadly, Nigeria degenerated to a state where the value placed on education became abysmal, as a result of bad priority, corruption, etc. Consequently, proceeding to institutions of higher learning for many students is nothing more than the need to obtain certification in a particular field. In many quarters of the nation, there came a surge of overreliance on certification, rather than on ascertaining the veracity of such certificates, as well as the quality of the certificate holder, in terms of skill, learning development and other pertinent considerations. Owing to undue emphasis on certification, many resorted to obtaining higher institutions' certificates by all means: fraudulent and questionable. In this regard, many have contracted others to write examinations for them; while some would pay 'research contractors' to write theses for them; some still would pay teachers/lecturers to award good grades to them or to their wards; and so on. It is, however, easy to get away with these anomalies because of the façade created by undue emphasis on certification rather than on competence. It is interesting to know that the described scenario also exists in law faculties. In this respect therefore, societal value on education has done great damage to the quality of legal education, which has turned out to be a challenge to even law teachers. It has also been observed that students hardly fail in private institutions, regardless of the academic performance of the student in issue; as long

²⁷Emphasis here on sight challenge does not necessarily place this above other physical challenges that may exist; this is however, because of this writer's personal experience. In this situation, the challenged student is left completely at the mercy of kind hearted lecturers and fellow students: at lectures and examinations; since the Institution has no specific provision, consideration or plan for such students, in order to ameliorate their plight (in the hostels, classrooms, and everywhere within the university campus).

as the school's tuition and other fees are paid.²⁸ This equally affects law faculties as well as others. This occasions low morale for the conscientious law teacher who is set to elicit from and accomplish the best in his/her students. Such teacher is under constraint to ensure that virtually all the students pass well, even when it is clear that some are undeserving, and that he/she is riding against the tide of teaching ethics. Another discouraging dimension in this regard is that any such teacher who insists on the best interest of the student, perhaps against the wishes of the proprietors to 'push the students on', may be, perhaps, regarded a wicked or sadistic lecturer, jeopardizing his/her job eventually.

3.5 *Governmental Influence*

This influence reflects in diverse ways on institutions of higher learning in Nigeria, particularly federal and state owned institutions. This is because the President and/or State Governors, respectively, are the 'Visitors' of their respective institutions,²⁹ depending on whether it is a Federal or State owned.

The powers of the Visitor are enormous over an institution, as prescribed by the Law: it is actually the powers of a proprietor. It could be safely inferred, therefore, that the institution is a reflection of the intention of its Visitor/Proprietor. It is pivotal to note that funding for the federal and state owned institutions derive primarily from the government; as such, the institutions cannot accomplish more than what is provided for, ordinarily. Nevertheless, this will not absolve the various institutions' leaderships in their own areas of failing, lack of focus, inappropriate prioritizations, etc. Thus, since the Visitor is the considered proprietor of the University that houses the Faculty of Law, the logical conclusion is that the problems and challenges confronting the institution, unabated, have been condoned by the proprietor. More so, federal and state institutions of higher learning are not financially autonomous; thus it is expected that they should be constantly held accountable to the Visitor and/or the designated person, usually the Minister of Education. It is also strongly considered high-time for all faculties of law to be allowed to operate the collegiate system. This is because of the stable academic

²⁸Usually, private educational institutions in Nigeria are highly commercialized; and there seems to be an unspoken or unwritten understand: that having paid so much, students are not expected to fail, under whatever circumstance.

²⁹See, for example, the Obafemi Awolowo University (Transitional Provisions) Act, CAP. O2, Laws of the Federation of Nigeria, 2004, where it states in the preamble that 'all references in the Law to the Visitor shall be construed as references to the President; and the power to appoint the Vice-Chancellor of the University shall vest in the President'. It states further in Part II, Section 6 which describes the Visitor and his functions, that 'the Visitor may from time to time conduct a visitation of the University in person, or after consultation with the Chancellor, direct that the same shall be conducted by such person or persons as he may appoint in that behalf, for the purpose of advising on the effective fulfillment of the objects and the due exercise of the functions of the University as prescribed by law'.

calendar of the Nigerian Law School, while that of many Universities in Nigeria remain unstable. As a result of this factor, some faculties of law have had to abridge their calendar, at the expense of both teachers and the students, in order to meet up with the Law School's calendar, which usually commences in September/October of every year. The core implication of this is that deep learning is impracticable for the students, as they have to be subjected to excessive rush, in order to cover the syllabus and/or meet up with the law school schedule, at all cost.

4 Conclusion

The problems and challenges enumerated should, actually, not be as perennial and defiant as they seem to have become; if there was commitment on the part of the Visitor as well as the various administrations of the concerned universities/institutions. Nevertheless, it is incumbent on Law Faculties in developing societies to resolutely pursue and ensure that their teachers on the one hand, and students on the other, emerge to achieving the proffered 'ideal minimum'. It is certain that this ideal is not as far-fetched as it seems, with a little determination, commitment, team spirit and dogged resolve to give a little bit more of what it takes. It is important also, that there be a departure from lip-service, and a turning to being sincere in matters of great concern, as law education is.

Chapter 38

Legal Education and Research in India: The Changes and the Challenges

Bhavani Prasad Panda and Minati Panda

The evolution of the legal profession in the context of globalization presents a very exciting research frontier and opens newer opportunities for legal education and research institutions.¹ It is a millennium prospect.² Law is an omnipotent problem suitor.³ The global society, with all its striding advancements in science, technology, and the vast affiliated instrumentalities, embarked upon large-scale overhauling

¹Priya Vinjamuri, “Strategic Management and Implementation of Legal Education in India, A Perspective”, *NLU DLRS*, 2012, at 64; 1 *NLUD*, 2012, *Access to Legal Information and Research in Digital Age*, at 110, “The Indian legal education and research is one of the prominent streams where transformations occur and multiple forms of domestic social capital are acquired, exchanged, and converted into other forms of capital that can be deployed on the global stage. As Indian corporate lawyers pursue their roles as architects of globalization, they are becoming a part of the new legal elites that form, sustain and propagate their conceptions of law. Developments in India’s corporate legal sector, together with developments in other emerging economies will have implications for the domestic and global rule of law and will also affect the way lawyers conceptualize, teach and practice law in the US and other advanced economies”.

²C.R. Kumar, *Global Legal Education in India: Opportunities and Challenges* (Halsbury’s Law, 2009) at 13; See also John Flood, “Legal Education, Globalisation and the New Imperialism”, in Fiona Cownie (ed.), *The Law School—Global Issues, Local Questions* (Ashgate Publishing Ltd., UK 1999); Donald B King, “Globalization Thinking for Modern Legal Education”, in Donald B. King (ed.), *Legal Education for the 21st Century* (Fred B Rothman & Co., 1999).

³K. Jayasurya, “The Rule of Law in the Era of Globalization: Globalization, Law and the Transformation of Sovereignty, The Emergence of Global Regulatory Governance”, 6(2) *Indiana Journal of Global Legal Studies*, 1999, pp. 425–456.

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and systematization process. The role of law is never ever as grandeur as of in the current world order.⁴ Consequently, legal education and research are under a great challenge.

The ambit of “legal education and research” got distinctively widened and entered into a larger orbit of the knowledge domain,⁵ in the post-WTO era. It has become a daunting task when the borders of the nation states are getting obliterated and getting prepared for an integrated global order.⁶ Most of the erstwhile issues which were labeled internal sovereign matters are now spilling beyond towards transnational reorganization and universalization,⁷ a convergence of systems are fast evolving.

India being the largest democracy has a crucial and distinct role to contribute to the global consortium in terms of access to justice.⁸ Law proper though originates within the sovereign municipal regimes it has to collaborate with the changing demands of civilized dictums of law and methods in foreign jurisdictions.⁹ The claims of legal education are no more limited to study of those few legal postulates and analyze the litigations within the narrow passages of procedural fineness and

⁴The importance of understanding law in a critical and reflective manner is a concomitant necessity due to the ideological nature and function of law. Granfield explained that the corpus of “[law] is a loose collection of propositions that constitute and reify ideas about such principles as rights, authority, obligations, and justice. Law then is ideological, and to study law ... is to engage in a course of study in ideology.” To be exposed to ideology in this manner without knowing that one is being exposed to ideology, without knowing what ideology is and what it does would be indoctrination and would be inconsistent with any academic, liberal arts, or civic conception of legal education. Timothy J Berard, “The Relevance of the Social Sciences for Legal Education”, available at: [www.ler.edu.au/vol.%2019%20RTFs/berard.rtf](http://www.ler.edu.au/vol.%202019%20RTFs/berard.rtf) [accessed on April 18, 2013].

⁵Roger Brownsword, “Law Schools for Lawyers, Citizens, and People”, in Fiona Cownie (ed), *The Law School—Global Issues, Local Questions*, 1999, pp. 27–30, 36–38; “Globalization is already molding the legal landscape in emerging economies and blurring the boundaries between global and local. Global law firms spread their operations through corporate groups to expand to fast-growing markets, and local firms are altering their structures and products to globalize—although the extent to which these firms truly conform to global standards remains an open question”.

⁶S. Randeria, “The State of Globalization: Legal Plurality, Overlapping Sovereignties and Ambiguous Alliances Between Civil Society and the Cunning State in India”, 24(1) *Theory, Culture & Society*, 2007, pp. 1–33; See also M.C. Regan, Jr. and P.T. Heenan, “Supply Chains and Porous Boundaries: the Disaggregation of Legal Services”, 78(5) *Fordham Law Review*, 2010, pp. 2137–2191.

⁷“Trade in Legal Services”, a Consultation Paper on Legal Services under GATS in preparation for the ongoing services negotiations at the WTO, Department of Commerce, Trade Policy Division Government of India, 2006, available at: <http://commerce.nic.in/trade/consultation-paper-legal-services-GATS.pdf>, [accessed on April 1, 2013].

⁸C. Davis and S. Bermeo, “Who files? Developing Country Participation in GATT/WTO Adjudication”, 71(3) *The Journal of Politics*, 2009, pp. 1033–1049.

⁹India being a member of the World Trade Organization (WTO) has been working toward removing the barriers to trade in legal services and has enforcement powers that could potentially limit the scope of national policy. See for instance Roy Stuckey, “Preparing Students to Practice Law: A Global Problem in Need of Global Solutions”, 43 *South Texas Law Review*, 2002, at 649.

processes of adjudication and expertise in those manipulating art of legal interpretation. Globalization pushed the third world nations to more varied and pluralistic paradigms of life and style resulting in vast imbalances. This situation provides for lawyers a unique opportunity—and perhaps an escalated responsibility too¹⁰—to analyze the social impacts of globalization and advocate for its losers.¹¹ Legal knowledge and methods have since got more interpolated with the ensuing schemes of change. Consequently, the legal education and related research have vastly become interdisciplinary and skill-oriented. There is a withering away of traditional legal methods.¹² It necessitated that the legal education and research have to provide a window to the whole range and dimensions of socioeconomic and political problems.

The object of this chapter is to identify the vexing issues with regard to legal education and suggest methods for raising the legal education to global standards. India needs to accelerate its knowledge base *inter alia* to build a legal education grid. It needs to fit into the level-playing paradigms of operation enriched with quality men, material and skills to keep afloat with the changing world order.

The legal fraternity needs to transform. The impulse of change needs to generate from the law schools into the students, the teachers, the lawyers and the judges who all need to enhance their capacity to comprehend matters transnational. The legal briefs and litigations in foreign jurisdictions are not limited to plain and simple legal nuances but also engage in foreign affairs and world trade.

India needs to gear up its legal education process to generate liberalization of advocate profession.¹³ The advocates from foreign jurisdiction have been willing to take up litigations in India, and the Indian counterparts have to enrich themselves to confront them not only in Indian courts but also in legal and adjudicating forums outside.¹⁴ The law “Limited Liability Partnership Act 2008” has been one of the

¹⁰Veerappa Moily, “Indian Legal System”, *New Legal Review*, 2010; “The legal profession must rise to the new opportunities that come about as a result of India moving to take her rightful place among the leading nation’s of the world. India deserves to be a leader in the global legal industry —this is our faith, our belief and vision.”

¹¹R. Agarwal and S. Nisa, “Knowledge Process Outsourcing: India’s Emergence as a Global Leader”, 5(1) *Asian Social Science*, 2009, pp. 82–92.

¹²N. Ahmad, “Adapting Indian Legal Education to the Demands of a Globalizing World”, 10(7) *German Law Journal*, 2009, pp. 847–858.

¹³Priya Vinjamuri, *supra* note 1, A Perspective—Creation of a good and effective legal suggestion system and implementation of the key areas that are highlighted to promote and improve in their services induce the confidence and boost the morale of the legal fraternity. Unprejudiced implementation of ideas and security for the position and financial stability are the key areas which need emphasis in the Indian legal system as these are very sensitive and challenging aspects that mar the systematic and effective functioning of the legal system. Effective and quality human resource management is another application aspect of effective quality legal management.

¹⁴Available at: www.adb.org/Documents/Books/Strengthening.Justice./chap05.pdf [accessed on April 1, 2013].

tangible steps, where the scope for registration of foreign law firms to establish a place of business in India and offer consultation service is now possible.¹⁵ Though the restriction on the legal practice by foreign counsels is still continuing, it is only a matter of time when India has to eventually liberalize and smoothen way for foreign lawyers to litigate in Indian courts.¹⁶

India, since is a key player in the changing world order,¹⁷ it has to level up as one of the world's most favorable destination for litigation resolution and justice watch.¹⁸ Outsourcing of brief preparation and pre-trial litigation memorials and routine tasks like electronic document management and review, legal research, and due diligence services etcetera ("Para-legal" service) ought to be co-curricular activity in the law schools. Law schools have to transform into world class.

In view of the rapidly changing equations and turbulent inequalities, the challenges to achieve world standard in legal education and research weighs heavy. More than mere challenge, the situation in the competitive world is "win-win" against "fail and get lost." "India is shining," "India is entering into the super power

¹⁵"The polarization of the debate and the need to reform regulation to protect indigenous industry are major barriers to moving forward. In the long term, however, India will have difficulty sustaining its position on foreign lawyers because of both the internal politics of the profession and external political pressure." With respect to the external political dynamics, India as a signatory of the General Agreement on Trade in Services (GATS) is under pressure to engage in the progressive removal of trade barriers and to liberalize services markets generally. The fact that the Indian government maintains a generally pro-free-trade attitude further highlights the difficulties of legal protectionism (Government of India, 2006). As India develops a greater stake in, and dependence on, other legal markets (either through the expansion of Indian law firms or through outsourcing) and demands that other countries pursue liberalization in sectors related to India's interest, it will necessarily become more vulnerable to foreign influence and more willing to open its legal market. As this debate plays out, Indian lawyers are immersed in another globalization process where boundaries are even less clear: the globalization of knowledge.

¹⁶Though in a recent Madras High Court case, the petitioner explicitly challenged the mode of entry of foreign lawyers in India, alleging that they were operating out of five-star hotels and violating taxation and immigration laws a charge, which the challenged foreign law firms vehemently deny.

¹⁷Mihaela Papa and David B. Wilkins, "Globalization, Lawyers, and India: Toward a Theoretical Synthesis of Globalization Studies and the Sociology of the Legal Profession", 18 *International Journal of the Legal Profession* 2012, at 7; It is by now common knowledge that globalization is transforming virtually every sector of the world's economy and the transformation has important implications for the rapidly globalizing market for legal services. At the same time, as economic power shifts, India, China and other emerging economies are becoming central players in this market. While scholars studying the legal profession have been increasingly interested in the globalization of the profession in general, there has been little debate about the effects of various globalization processes—economic and non-economic—on the Indian legal profession, and recent scholarly attention to legal developments in India has largely focused on legal process outsourcing and foreign law firm entry.

¹⁸Globalization of governance presents two major challenges to the legal education. The first challenge is to understand who regulates the legal education and also the profession; and ensure appropriate mechanism. Second, as international institutions and global governance become more relevant and India transforms into a world power, the country has to have lawyers those can lead and defend its rise and shape the global legal order the way India sees fit.

race," "India is emerging as a knowledge hub," and adages like these are some of the populist pronouncements pleasant to listen and dream.¹⁹ The road to excellence seems very long and the pace seems diminishing and the hopes are waning.²⁰ The indifferent and lackadaisical attitudes of the stakeholders are making India's agenda for a "knowledge society" a damp squib. There prevails dissatisfaction towards the whole gamut of affairs in legal education, legal profession, and the very justice delivery mechanism. There appears a system failure symptom.²¹ The foundation base for legal order, the necessity of legal regulations, and the significance of legal support system though are considered vital by everybody, yet the associated rigor and respect that "law" ought to command is not happening.²² The traditional legal education curriculum gives little express consideration to generic skills (such as oral communication, self-reflection, teamwork, computer skills, and so on) or legal skills (such as legal reasoning and problem solving, legal research, interviewing, negotiation, advocacy and so on), ethics, theory, attitudes and values, interdisciplinary perspectives on law, or the international aspects and implications of law and legal practice. Whatever skills students learn are acquired with scanty direct guidance or instruction from teachers, and they are often not specifically assessed. Theoretical issues are seldom addressed explicitly, except in subjects on "Jurisprudence," and the socially constructed and contestable nature of law is seldom explored. Attitudes

¹⁹Ibid, So far the much needed support for the regulation of legal education has not commenced, though the legal system is likely to be affected by these developments. India's ambitions in other areas of global governance have increased, creating a demand for legal capacity building and strategizing to redesign global institutions. As globalization progresses, the regulatory performance of both Indian and global institutions will be tied to efforts to make those involved in governance more accountable.

²⁰N.R. Madhava Menon, "A Transformation of Indian Legal Education", *A Blue Paper, Harvard Law School, Program on the Legal Profession*, 2012, the expansion of law colleges continued during this period, enrolling annually about 200,000 students in the over 900 law teaching institutions in the country. Quality remained a casualty in many of these institutions which included university departments of law (roughly 150), Government managed/funded colleges of law (about 150) and the rest privately sponsored self-financing mostly part-time (evening) institutions.

²¹Although the Limited Liability Partnership Act, 2008 began to address some constraints and removed the restriction on the number of partners, significant challenges remains. For example, Indian law firms are still prohibited from maintaining a web site or distributing brochures that describes the firm's areas of practice and personnel. Needless to say, it is far from clear how much these remaining regulatory restrictions would actually impede the ability of Indian firms to compete with potential foreign competitors. From the standpoint of economic globalization, however, the important point is that the fate of these domestic regulatory restrictions has now become a part of a broader debate over the way that the Indian legal profession will respond both normatively and structurally to the pressures of the global market place.

²²A strong domestic public interest constituency and infrastructure is crucial for the evolution of social movements that use law to address globalization's document. India has been a focal point for such globalization battles, which significantly contributed to the global public policy discourse on development and had repercussions far beyond the domestic sphere. A potent example is a multi-level public interest advocacy effort against massive World Bank funded developmental projects and related land acquisitions in river projects, power plants etcetera is yet to evolve.

and values are seen as irrelevant. Transnational aspects of law are not directly considered, except in elective subjects like private or public international law.²³ There is huge space for augmentation and development.

The legal scholarship scenario in India continues to reflect—that the “law makers probably legislate law for “others”; law probably is meant to be honored by the adversary or the “opposite party”; law is a tool of “privileged few”; law courts resolve dispute with delay that does not justify justice; orders of courts are worded in a language convenient for dual interpretation,²⁴ legal education is a casual academic pursuit; law degree does not promise “employment”; and legal education at law schools is only an addendum”, and so on so forth. Social justice is the biggest casualty.

Eighty percent or more of “men of law” graduate from the traditional law schools (TLS hereafter). The conditions in TLS coupled with the outdated learning process aggravate the chaos in the above quandary.²⁵ These TLS are wishy-washy with poor infrastructure, starving without law teachers, managed by people apathetic and indifferent to law and legal learning. These TLSs reign large with little or no control by the regulatory bodies like the Bar Council of India, the affiliating universities, and the concerned state government. Most of the dictates of the Bar

²³The characteristic of traditional legal education concerns what is taught. Traditional legal education is almost entirely concerned with the transmission of content knowledge and, more particularly, with teaching legal rules, especially those drawn from case law. According to Dicey, nothing “can be taught to students of greater value, either intellectually or for the purposes of legal practice, than the habit of looking on the law as a series of rules.” The main teaching resource, aside from didactic lectures, is textbooks and case books. These books are commonly written in treatise style, and do not engage the reader in any activity aside from reading. Often texts are marketed as being as suitable for practitioners as they are for students, and this is so even for some subjects commonly taught in the first year of the law degree. This suggests not only a close connection between legal education and legal practice, but also that there is no appreciation of the students’ intellectual development as they progress through their degree. Legal rules are taught in year or semester long subjects, based on nineteenth century categorisations of law and without any consideration of their theoretical, historical, political, or economic foundations. Subjects are treated as discrete and having little direct interaction. Students are taught the same type of material a detailed analysis of common law rules and given the same type of assessment examinations testing mastery of the legal rules and their application to hypothetical problems semester after semester, in much the same way, focusing often exclusively on learning legal rules from listening to an expert describing them, or reading a text which focuses on legal rules. The only thing which changes between subjects and between semesters in the student’s progression through the degree is the substantive rules which form the content of the subjects. See also R.J. Scragg, “Law, Skills and Transactions: The Opportunity for an Expanded Curriculum”, *New Zealand Law Journal*, 1995 at 234.

²⁴In continuum to the problems of litigations, the law statements, documents and the very language of law and court orders provide a contagious territory for breeding enriched arguments on either side.

²⁵*Supra* note 23.

Council of India are broad, impracticable and futile (since not supported with the requisite fund). These TLS systematically contribute to the unmaking of “rule of law” society.²⁶

Most of the patron universities have no sensitivity to legal education and as such they do not exhibit any priority to remove the dismal happenings to legal education under their aegis.²⁷ The unremitting apprehensiveness in those educational administrators over the years has put the TLS in a low priority with aggravated failures in legal education. There appears a cruel and systemic negligence to the legal scholarship.²⁸ The ill-groomed law students graduated from the TLS are in proximity to the criminal strata of the society, and they are “constructed” as such at the end of the day. They are the victims of the apathetic educational system, who are destined to suffer. The tale of these first generation law schools (TLS) and the emergent law graduates, there from, are unending with the typology of students released to society.²⁹ However, in exception most of them are currently adoring the high offices, including chancellors, judges, ministers, bureaucrats, and also legislators. As of 2010, there were approximately 500,000 law graduates in India, with approximately 60,000 graduates joining the stream every year.³⁰ These first generation law schools still continue to flourish. For “what purpose” is a big question that country probably has to answer.³¹ The affairs at these TLS threaten with more

²⁶They (the students at law schools) learn—how not to attend the classes,—how to manage high ranking marks,—how to exploit the impoverished institution and abuse on lines of anomaly of the system,—how to bully around and discount law in every thing that follows in life.

²⁷For those traditional university educational administrations, legal education is after all—one of the five faculties of disciplines mandatory to attain the seal of approval from University Grants Commission; an unavoidable necessity rather than a component in educational integration. Statistics will certainly reflect that the educational administrators do not want to get marred with the horrific scenario of law schools under their administration. No traditional university authority in India is ever interested in running legal education program within the prevailing model of university system; given the option, probably all the universities in India would remove the “law schools” from their sphere of educational administration.

²⁸It may be summed up as—whatever the wisdom in legal scholarship the Nation exhibited has been the individual choice and endeavor of the learned lawyer or a judge or a law teacher despite the fact that the state has failed in its responsibility for legal education.

²⁹R. Dhavan, “Means, Motives and Opportunities: Reflecting on Legal Research in India”, 50(6) *The Modern Law Review*, 1987, pp. 725–749.

³⁰S. Gupta, *History of Legal Education*, (Deep & Deep Publications Pvt. Ltd, New Delhi, 2006); The Bar Council proposed to change this system by phasing out 3-year LLBs (making the 5-year LLB degree the norm and allowing three-year programs only if they focus on specialized areas of law), introducing benchmarking of law colleges, standardizing the academic calendar, creating a new national curriculum and improving teaching and continuing education.

³¹*Legally India*, July 13, 2010; There are three negative consequences of the teacher-focused nature of traditional legal education. The first is that it leads governments and universities to believe that legal education is inexpensive to provide. Second, students are treated amorphously and as though they are homogenous. Given that law teachers were traditionally predominantly middle class men, third consequence of the teacher focus is that students’ experience of learning is not taken seriously. The assumption is that if the teacher teaches, then the students will learn; if they do not do so successfully, it is the students’ fault. Consistently with this, student learning is

stifling demands and hard pressed claims.³² The state has to owe the responsibility to this terrible failure to the great mass of legal scholars in the country. Reformation of TLS with a fire-fighting spree, unless taken up, all good intentions of change will fail.

In the second generation of legal education reforms, India evolved the “national law universities” (NLU hereafter) starting the expedition form National Law School India University at Bangalore.³³ The National Law Schools system undoubtedly gave a fresh identity to legal educations.³⁴ Things appeared very encouraging. The

(Footnote 31 continued)

not properly evaluated. Evaluation, if it is undertaken at all, is likely to be used in a purely pragmatic sense by both teacher and law school, in which the teacher’s overall satisfaction or popularity rating is used for various purposes and any other feedback received from students is discarded.” Indeed, the former head of the Bar Council recently proposed slashing the number of Indian law schools by more than 80%, from 913 to 175.

³²In context of Australian Law School it has been analyzed as follow: Mary Keyes and Richard Johnstone, “Changing Legal Education: Rhetoric, Reality, and Prospects for the Future”, 26(4) *Sydney Law Review*, 2004, at 537, “they conclude with some key challenges facing tertiary legal educators. The first challenge is for Australian law schools to rethink their relationship with the legal profession, to ensure that law schools assert their autonomy in matters of curriculum, teaching and learning and research, so that legal education aims for more than preparing students for work in private legal practice. A second challenge is to take a collective, law school-wide, approach to integrate matters such as legal theory, interdisciplinary, ethics, general and legal skills, and issues of internationalization, gender and indigeneity, so that law students are provided with a coordinated and incremental approach to developing knowledge, skills and attitudes. Third, law schools need collectively to engage with educational theory to develop approaches to structured and activity-based teaching, and to cooperative and collaborative learning in law schools. Finally, the evaluation of teaching and of subjects needs to be rescued from its current use predominantly as a management instrument, and to be used instead by law teachers to understand, reflect upon, and respond to the ways in which students experience law subjects and law teaching”.

³³There are as many as 15 National Law Universities across the country as on date. The basic premise of most arguments for multi- and inter-disciplinary legal studies (and by extension the relevance of such studies for legal education) is quite simply that legal phenomena and studies of legal phenomena are so various that they necessarily belie the artificial boundaries of established academic disciplines. Moreover, legal phenomena seem to be increasingly various and complex. With the rise of, for example, paralegal professions, competition between law firms and consulting firms for traditional legal work, increasing business interest in multidisciplinary practice, and the increasing interest of law students in joint degrees, legal phenomena are arguably becoming inter-vocational as well as interdisciplinary. The discipline of law has never been up to the task of understanding law in all its facets, and this is becoming increasingly true and increasingly clear as distinctions between law, other vocations, professions and social systems become increasingly contested and confusing. While interdisciplinary scholarship has flourished and its relevance to legal education has not gone unnoticed, the incorporation of interdisciplinary teaching and learning into legal education has certainly not kept pace.

³⁴Available at: <http://indiatoday.intoday.in/story/career-law-advocacy-skills-national-law-school-of-india-university/1/166227.html> “To some extent, this change in perception can be credited to the rising influence of the National Law Universities (NLU’s), widely acknowledged as the leading institutions of legal learning in the country today. In the words of Prime Minister Manmohan Singh the NLU’s are, “a small number of dynamic and outstanding law schools” in the country, which “remain islands of excellence amidst a sea of institutionalised mediocrity.”

law schools reflected an aura of serious business in learning law.³⁵ The schools started smelling better, equipped with modern gadgets, qualified and committed teachers, state of art infrastructure in terms of class rooms, seminar halls, moot-court halls, law library with fresh collections of books and journals, including modern gadgets of both hardware and software in computer systems to facilitate both the learner and the tutor.³⁶ Academic oriented residential-facility, residential tutors, and the trainers available round the clock service are some of the distinct features of these national law schools. Most of the states in the country feel proud for establishing one such law school in their state capital. Economically backward states like Bihar and Odisha also established National Law Schools at Patna and Cuttack, respectively. The students and parents also feel proud for being associated with such a law school with campus-selection backup system. The students and parents ventured to take study loans to gain entry and continue education to these NLUs. Investment on legal education in a big way started happening. Middle-class citizens started entering to the elite race of law schools. The number of students finds a seat in such law school is decimaly low compared to the actual need.³⁷

The national law schools unconsciously created a class society.³⁸ The elites felt privileged to study because of the fees structure. Fees are never a criterion for good education system, only the huge gaps in two systems espouse ill-will. The NLU initially aimed to groom students for taking the fort in legal profession and judiciary beside other paralegal positions.³⁹ But the WTO regime has sucked all the produce of NLU into the market business of corporate lawyering services and converted them as corporate clerks,⁴⁰ they are largely employed for the operation of LPOs and

³⁵Stuckey Roy, *Best Practices for Legal Education: A Vision and a Road Map* (the Clinical Legal Education Association, United States, 2007) at 2.

³⁶Michael Geist, "Where Can You Go Today? The Computerization of Legal Education from Workbooks to the Web", 11 *Harvard Journal of Law and Technology*, 1997, at 141; Andrew Smith, Peter Ling and Doug Hill, "Adoption of Multiple Modes of Delivery in Australian Universities", 3(2) *Journal of University Teaching and Learning Practice*, 2006, pp. 67–68.

³⁷Supra note 34, "Last year, approximately 24,000 candidates appeared for the CLAT exam, of which only 1200 or so were selected for admission to the various NLUs".

³⁸Duxbury makes a complementary point, that the law and society movement has made impressive and important contributions in showing "how the operation of law is very different from what one would expect were one only to study the law itself," but he also expresses regret that the contributions of law and society scholarship have been undervalued in traditional legal scholarship.

³⁹M. Galanter, "New Patterns of Legal Services in India", in R. Dhavan and M. Galanter (eds), *Law and Society in Modern India* (Oxford University Press, New Delhi, 1989); M. Galanter and L. Krishnan, "Debased Formalism: Lok Adalats and Legal Rights in Modern India", in E. Jensen and T. Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press, Palo Alto, 2003).

⁴⁰B. Fischer, "Outsourcing Legal Services In Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing", 16 *Southwestern Journal of International Law*, 2010 at 454.

things like that at law firms with high premium pay package.⁴¹ Most of the law graduates at NLU feel they need to quickly earn money and repay the loans incurred and then turn to litigation counseling.⁴² As the situation stands the NLU enhanced confidence of law in the society as an institution with some difference, and contributed to a certain extent with learned cadre of law graduates to society. Yet the acclaimed legal education at NLUs due to the elitist pressure is signaling signs of going astray.⁴³ Rules are relaxed in every front to accommodate the student's voice. There has been a crisis of trainers and committed law teachers. Due to excessive autonomy in NLU, the weak administrations are failing to maintain quality education. Unqualified persons are recruited liberally as law teachers and professors. University Grants Commission (UGC) rules are largely stretched. Bar Council norms in course design are interpreted against the spirit. The admissions, the admission test, the national/state reservation policy, the course content, the study pattern, the attendance, the examinations, the evaluation and the grading system are openly violated. Mostly, the Chief Justice(s) of the Nation or of the State (s) are the Chancellor of NLUs by statute. The NLUs take advantage of the position by sending a wrong signal to the adversary in defying situations. There is also a crisis of administrators with vision and drive. Most of the directors of national law schools are yet to exhibit the required vigor and legal temper. Inventiveness, challenge, leadership, and ingenuity mostly are all missing. Mediocrity writ large has been the order. NLUs are struggling for getting another Menon or a Mitra though with certain exceptions. No benchmark is yet evolved.⁴⁴ Successive administrators at NLUs mostly struggle in carrying forward the institution and in the process have largely diluted the set quality. Administering a NLU calls for a

⁴¹To be sure, even if these hiring trends persist, the fact that the NLUs graduate only a tiny fraction of the total number of Indian lawyers will mean that it will take a very long time for the Indian corporate sector to approach the overall size of the “personal plight” (to use Heinz and Lauman’s original evocative phrase) sector of the Indian bar where most Indian law graduates continue to be employed. But even if the overall size of the corporate sector remains relatively small in relation to the Indian bar as a whole, the pattern of elite replication suggested by these placement patterns from the NLUs is still significant. The fact that similar placement patterns in the US have persisted since at least the 1920s notwithstanding concerted efforts by legal reformers to encourage American law students to pursue public interest careers, illustrates the difficulties of changing this dynamic; see *Supra* note 17, at 15.

⁴²Shamnad Basheer, *supra* note 34, December 28, 2011, “Little wonder then that many of the leading NLU’s have near perfect placement statistics and their graduates earn some of the highest entry level salaries, competing with the best from the IIT’s and IIM’s. Top graduates from the top NLU’s can earn as much as Rs. 15 lakh per annum soon after graduation.” See also M. Owen, “Legal Outsourcing to India: The Demise of New Lawyers and Junior Associates”, 21(2) *Pacific McGeorge Global Business and Development Law Journal*, 2008, pp. 175–190.

⁴³D. Held and A.G. McGrew (eds.), *Globalization Theory: Approaches and Controversies* (Polity Press, Cambridge, 2007).

⁴⁴Gaye Lansdell, “The Flexible Learning Paradigm: Have We Forsaken Quality and Professionalism for Technological Convenience in the Training of Lawyers in the 21st Century?”, in Angela T. Ragusa (ed), *Interaction in Communication Technologies and Virtual Learning Environments: Human Factors*, Information Science Reference, 2010.

continuous imagination, creativity, and experimentation; there cannot be a precedent to copy and say “it is done”; every action has to be something different and a new milestone. There cannot be a look back in learning and rendering the service. There has to be much unlearning. The institutional process and learning have to be essentially everything new, newer methods, newer zeal and sparkling energy to contribute to the world order.⁴⁵ The NLUs need be fortified with the valuable service they are rendering.⁴⁶

The NLUs are appearing to limp because of dilution of standards at a time when more rigorous skill learning exercise and stringent quality tests need be evolved to match global standards.⁴⁷ As many as six pieces of legislation are now pending in Parliament which, if adopted, are potentially capable of radically changing the higher education scenario in the country, including legal education. It is in this context that the Ministry of Law and Justice proposed what may be called the “third generation” reforms in legal education, wherein a variety of changes in the regulatory framework are contemplated along with more national law schools and additional government funding of advanced centers for research and training in law.⁴⁸

⁴⁵C. Krishnamurthy, “Legal Education and Legal Profession in India”, 36(2) *International Journal of Legal Information*, 2008, pp. 245–257.

⁴⁶The motivating factor—“excellence in legal education” need be reminded from time to time, yet the learning process need be nurtured with joy and ecstasy of time. The students need be cultured to realize the satisfaction of sacrifices made in studying law lies in contributing to the legal resources of the new world. It is an overwhelming task. Most of the law schools could inculcate the “feel good” in the learning process. There has been divergence, most of the students learn more from their peers and mimic seniors and fail in their creative learning process. They learn shortcuts and mess their learning time with other deviations. Many of the students undergo a stress not being able to cope up with the law school environment. Counseling of the appropriate students also needs to be part of education system.

⁴⁷Vivienne Brand, “Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education”, *Legal Education Review*, 109, 1999, pp. 139–140; Mary Keyes and Richard Johnstone, “Changing Legal Education: Rhetoric, Reality and Prospects for the Future”, 26(4) *Sydney Law Review*, 2004, pp. 537–538; The Monash PDLP ceased in 2009 due, in part, to these factors. Prior to this in 2007 the Law School also withdrew its Skills, Ethics and Research courses (SERs), removing key vocational elements from the curriculum. See for instance M. Sako, “Global Strategies in the Legal Services Marketplace: Institutional Impacts on Value Chain Dynamics”, 2009, available at: <http://www.sbs.ox.ac.uk/centres/professionalservices/Documents/SAKO.pdf> [accessed on April 27, 2013].

⁴⁸Mark Blaxill & Ralph Eckardt, “The Invisible Edge: Taking your Strategy to the Next Level Using Intellectual Property”, *Portfolio*, March 2009; Strengthening the legal education-strategies —“The simulation courses of legal education such as legal research and writing, appellate advocacy, interviewing and counseling, negotiation, alternative dispute resolution, trial advocacy should be taught with the lawyering skills of problem solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication skills, client counseling, negotiation, litigation and ADR procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. Lot of home work coupled with sufficient financial allocation need be done to augment the position to an uniform homogenous system”.

Meanwhile the NLU structure which envisaged rigorous learning process with both teacher-student combine round the clock mandates for a well motivated team work among all the staff and students. Five-years time-period for a law student at the growing age and stage of a young adult is too-long a period of life and calls for mastering concentrated dedication along with many a sacrifice in the same campus appears to be too monotonous. A type of saturation of ideas is fast gathering moss resultantly stereotyping the NLU model.⁴⁹

Time has come for thinking more radically of a newer model of legal education so as to keep the student engaged all through the 5 years in the learning process with all enthusiasm. The new model of institutions has to also reorient with the demands of student life, academics and zeal. Appropriate arrangement for exposing the students to the varying socio-cultural-economic and political real life situations need to be inbuilt.⁵⁰ The students need to get acclimatized to the life of learning and evaluation as a continuous and routine process.⁵¹ There has to be sufficient scope for bringing in more creative paradigms of skill training.⁵² The education model has

⁴⁹“The breadth of the idea of fundamental legal research illustrates the point about overlapping categories. Legal research today may be thought to be considerably broader than the tripartite classification of the Pearce Report, as it embraces empirical research (resonating with the social sciences), historical research (resonating with the humanities), comparative research (permeating all categories), research into the institutions and processes of the law, and interdisciplinary research (especially, though by no means exclusively, research into law and society). The T. Shanahan, “Legal Scholarship in Ontario’s English-Speaking Common Law Schools”, 21(2) *Canadian Journal of Law and Society*, 2006, at 36. Pearce Report did not really capture these extended elements of legal research, yet in some ways they are not so much new categories as new or newly emphasized perspectives or methodologies. They highlight law as an intellectual endeavor rather than as a professional pursuit, though the latter is undoubtedly enriched by the former.

⁵⁰The students need be exposed to newer place of learning with a newer environment every year. The teachers and the students need to have complete faith on the system and their respective role play. The students need to spend quite some time in association with learned advocates, bureaucrats, legislators, judges and with all such other ports of learning. The course and the class room exercises need be done with defined goals and evaluated accordingly. The course work need be scientifically designed by the teacher in consultation with the faculty improvement trainers.— See generally G.W. Russel, “The New Legal Architects”, *India Business Law Journal*, 2010, available at: <http://www.indialaw.com/pdfs/Top%20foreign%20law%20firms.pdf> [accessed on April 1, 2013].

⁵¹Examination schemes need be creative, imaginative and self evaluating. Examination strain need be done away by making the evaluation model continuous and perennial. One is examined at every time and evaluated accordingly. In other words there is nothing to be so serious about examination, for “examination at all times is no examination.”

⁵²The suggested objects of the Australian Academy of Law according to the proposal developed by Professor David Barker, Dean of the Faculty of Law, University of Technology, Sydney are: to promote excellence in and encourage the advancement of legal practice in Australia; to promote collegiality among members of the judiciary, legal profession and law teachers; to promote excellence in legal research and the publication of contributions to legal knowledge; to promote the professional development of members of the legal profession; to promote views relating to legal reform to the Government, community and other professions; and to promote high standards of ethical conduct within the legal profession.

to internalize market requirement as well as system requirement.⁵³ The improvement/change in the course structure need be recorded and continuously reviewed.⁵⁴ The teaching of law should be designed as a soul satisfying exercise rather than simply parroting the same postulate, the same case law and/or legal principles all the time.⁵⁵ The accreditation of teachers may be conducted by an independent regulatory body with the object of suggesting methods for improvements rather than penalizing for failures.⁵⁶ The envisaged law school must pitch an expensive tent, bringing together people who are focused on everything from the teaching of professional skills to the elaboration of an area of law, empirical research, and the most difficult concepts of legal philosophy. Attention has to be given to master skills such as: communicating orally; gaining others' confidence;

⁵³ Robert Lloyd, "Investigating a New Way to Teach Law: A Computer-Based Commercial Law Course", 50(4) *Journal of Legal Education*, 2000, pp. 587–590; which discusses the costs in terms of workload for staff using discussion boards.

⁵⁴ John Biggs, "Teaching for Better Learning", 2(2) *Legal Education Review*, 1989–1990, pp. 133, 144; See also S. Nathanson, "Developing Problem-Solving Skills", 44 *Journal of Professional Legal Education*, 1994, at 215, the divergence in subjects like taxation, environment, human rights, criminal justice administration, banking, corporate administration, governance, personal law, arbitration & mediation and international law (both private and public) all have to go hand in hand. The teachers need to produce their respective courses with newer designs, newer goals, and newer methods of teaching every succeeding year.

⁵⁵ L.B. Snyder, "Teaching Students How to Practice Law: A Simulation Course in Pre-Trial Practice", 45 *Journal of Legal Education*, 1995, at 513 See also Rob Nadolski and Jurgen Woretshofer, "The Use of ICT in the Training of Legal Skills", 39 *Law Teacher*, 2005, at 29; Note—"May be the teachers are allowed to avail academic holiday of three–six months every alternate year to update by attending refresher courses/ associate with other relevant interdisciplinary institutions and give newer orientation for the year that follows. May be the teacher be allowed to visit other similar institutions and work as an adjunct faculty with two or more institutions." See also Jeremy Webber, "Legal Research, the Law Schools and the Profession", 26(4) *Sydney Law Review*, 2004, at 565, the different aspects of strategic quality management that need to be thoroughly understood and applied to create an effectively efficient quality legal educational management system which include financial strategy, basic business strategy, research strategy, and most importantly a wage system based on ability. A quality feedback system with a creation of an understanding and awareness of the overall direction of the legal organization in particular and the legal system in specific, as there is nothing general about a law functionary, and the importance of reinvesting the profits of knowledge and finance to promote further growth and technological advancement is crucial to the growth of a technologically savvy legal knowledge system.

⁵⁶ A. Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004); See also J. Schukoske, "Meaningful Exchange: Collaboration among Clinicians and Law Teachers in India and the United States" in L. Trublek and J. Cooper (eds), *Educating For Justice Around the World: Legal Education, Legal Practice, and the Community* (Ashgate Publishing, Dartmouth, 1999).

drafting legal documents; analyzing and planning a solution for a legal problem; organizing and managing legal work; negotiating; fact gathering; counseling; understanding and conducting litigation; obtaining, and keeping clients.⁵⁷

At the same time the existing private law colleges, the university law colleges and other state aided/unaided law colleges all need to be rebuilt plugging all possible shortcomings.⁵⁸ A national connectivity (grid) of all these institutions need to be developed.⁵⁹ The research, library and other academic facilities of NLU need to be partnered with law schools in their jurisdictions. The legal education has to link with society, with political regime, state governance, judicial process, alternative models of adjudication.⁶⁰

The interaction of law and social science is something with which the law student will want more than a passing familiarity. The social sciences are vital to law, since law is preoccupied with human behavior and its implications.⁶¹

⁵⁷“The ten highest scoring characteristics (out of a possible 65) were: (1) Knowledge of substantive law; (2) A professional attitude to the practice of law; (3) An ability to identify legal issues raised by a fact situation; (4) A commitment to timely communications with his/her client; (5) Knowledge of legal practice and procedure; (6) An ability to give clients practical advice; (7) Knowledge of professional or ethical standards; (8) A commitment to staying up to date with the law and legal practice generally; (9) Concern/care for well-being of clients; (10) Being diligent or persevering in his/her work.”

⁵⁸A. Sechooler, “Globalization, Inequality, and the Legal Services Industry”, 15(3) *International Journal of the Legal Profession*, 2008, pp. 231–248; see also D.B. Wilkins, “Some Realism about Legal Realism for Lawyers: Assessing the Role of Context in Legal Ethics”, in L. Levin and L. Mather (eds) *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, Chicago, 2012).

⁵⁹D.M. Katz, J.R. Gubler, J. Zelner, M.J. Bommarito, E.A. Provins and E.M. Ingall, “Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate”, 61 (1) *Journal of Legal Education*, 2011 pp. 1–28.

⁶⁰D. Subbnarsimha, “Retrieving Indian Law: Colonial Erasures, Postcolonial Pedagogies”, in M. John and S. Kakarala, *En-culturing Law: New Agendas for Legal Pedagogy* (Tulika Books, New Delhi, 2007); See also Contrast Harry T. Edwards, “The Growing Disjunction between Legal Education and the Legal Profession”, 91 *Mich LR*, 1992, at 36; by awareness of total non-legal environment, it is meant that the first-class lawyer’s ability to comprehend the non-legal environment of the problem at hand, to evaluate the impact that non-legal considerations will have upon the outcome, and to perceive the ways in which the knowledge and insight of non-lawyers can be mobilized and brought to bear. Every legal problem arises in its own unique setting of economic and political considerations, historical and psychological forces; each legal situation raises its own problems of data accumulation, ordering, and weighting.

⁶¹Jack Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Routledge-Cavendish, 1998); Greater synthesis of globalization studies and the sociology of the legal profession would produce benefits for both fields. Scholars and practitioners have vigorously debated the advantages and disadvantages of globalization in different areas of study. The globalization of the legal profession represents a new frontier for globalization scholars, and acts as a test case for applying the lessons learned over the past decades. As such, it would benefit from a greater integration into the mainstream globalization literature and policy debates. Indian debates on market opening, shaping legal education or reforming “Regulatory frameworks illustrates that concerns about globalization’s discontents are much alive, and that there is an ongoing search for innovative solutions. Insights from the sociology of the legal profession can

The legal process is a part of a vast surrounding social process; the first-class lawyer never loses sight of that larger picture.⁶²

A combination of the class room curriculum and the analytical clinical methodology which should be the prevalent theme in discussions of live client clinics increases the accountability of the students during the course of their study.⁶³ A good clinical teaching of law requires the need to develop counter-narratives, such that if the theme of the clinical narrative is insubstantial, the counter-narratives must be capable of reinforcing and explaining the concept.⁶⁴ Hiring of members from legal and paralegal fraternity (lawyers, law officers in bureaucracy, legal advisors, corporate lawyers, counselors, judges, arbitrators, law commission officers, forensic experts and other relevant experts) to teach, adapt and implement the clinics is another challenge that can be easily surpassed by emphasizing on the need for educational value vis-à-vis use of live client clinics and simulation courses of law.⁶⁵ Support should be sought to integrate the education system from the Bar Examiners, Bar Councils, the Bar and actively involve the

(Footnote 61 continued)

help globalization scholars set the stage for more vigorous and nuanced empirical studies on the globalizing Indian legal profession. The results of these studies would in turn shed important light on the tension between the economic opportunities created by globalization and questions of equality, inclusion, and the rule of law studied by socio-legal scholars, Wilkins, *supra* note 58.

⁶²David Spencer and Samantha Hardy, "Deal or No Deal: Teaching On-Line Negotiation to Law Students", 8(1) QUTLJJ, 2008, pp. 93,100.

⁶³John Zerelli, "Reflections on Legal Education and Philosophy: The Critical Role of Theory in Practice", *Legal Education Review*, 2007, pp. 103; 107, the combination of the two is important as it allows for a stringent analytical and substantive understanding of the subject area of law.

⁶⁴Therefore, a good clinical teaching of law does far more than wed knowledge of legal doctrine and legal analysis with common sense. Though expensive, the live client clinics owing to their simulation focus may be considered as an alternative to seminars, moot courts and law reviews and may be considered as an add-on to the main course of substantive legal education Development of multi-year strategies for clinical implementation of the live-clinics of substantive law, negotiation subjects, which is a key to litigation and the practice of law, should be implemented so as to promote a live dealing of the legal procedure during the course of study.

⁶⁵Karl Mackie, "Lawyers' Skills: Educational Skills" in Neil Gold, Karl Mackie and William Twining (eds) *Learning Lawyers' Skills* (Commonwealth Legal Education Association, 1989) pp. 9–18; Bobette Wolski, "Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum", *Journal of Legal Education*, 2000, at 287; Sharon Christensen and Sally Kift, "Graduate Attributes and Legal Skills: Integration or Disintegration", 11 *Legal Education Review*, 2000 at 207; Note: The simulation courses of legal education such as legal research and writing, appellate advocacy, interviewing and counseling, negotiation, alternative dispute resolution, trial advocacy should be taught with the lawyering skills of problem solving, legal analysis and reasoning, legal research, factual investigation, oral and written communication skills, client counseling, negotiation, litigation, litigation and ADR procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. The coalitions with law schools in India formalizing the need for simulation clinics as a part of the legal curriculum, integrated approach to the learning and application of law and legal studies is important to facilitate a thorough understanding of the need for a change in the strategy in the implementation of legal education.

alumni of the law schools working in the legal firms and various other organizations to enhance the standard of legal education and its efficacy.⁶⁶

As the Indian legal industry will grow and shall be subjected to testing domestic and international scrutiny, even such traditional bastions of professional privilege as senior advocates will be called on to justify their actions in ways that pay express attention to issues of social responsibility.⁶⁷ Although it is too early to tell what the consequences of this stringent scrutiny measures will be, it is possible that this greater social awareness will increase pressure within India for more regulatory frameworks that promote public interest, place greater emphasis on clinical education, and potentially lead to an increase in corporate philanthropy.

The pedagogy in legal education has to be infused with at least six relatively discrete ideologies or discourses: doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism, and radicalism. Each of these paths is an archetype of “power–knowledge”: each is a different variety of knowledge and each is a different

⁶⁶Herbert L. Packer and Thomas Ehrlich, *New Directions in Legal Education* (McGraw Hill, New York, 1972); Packer and Ehrlich suggest that a proper study of law focuses the student’s attention on the conception of a legal system; who operates in it, how they function, what impact they have, how the system changes, the impact the system has on other elements in our society, and vice versa. Here the effort is to give the student an idea of law as a social process, the functions it performs, the institutions involved, and how change takes place. It gives at least an introductory idea of the structures and processes involved in society’s efforts to shape and organize individual and group behavior a view of law as an ordering process a study of law opens up questions of how social ends and means interact and reveals the complications involved in attempting to create or recreate the ongoing, working institutions of a society. Theory and practice meet and interact. Values, ends, means, information, and theory all intersect. Such a study of law is not so much another discipline as an education in the relation of specific social problems to various sources of knowledge and modes of thought. See also Roger Burridge and Julian Webb, “The Values of Common Law Education: Rethinking Rules, Responsibilities, Relationships and Roles in Law Schools”, 10(1) *Legal Ethics*, 2007, pp. 72, 74 and 75.

⁶⁷Wilkins, *supra* note 58, for example, argues that recent curricular innovations in legal education are still insufficient to close the gap between legal education and legal practice. Wilkins calls for: systematic and rigorous quantitative and qualitative research about the profession’s institutions, organizations, norms, and practices, and how each of these “arenas of professionalism” is evolving and should evolve to confront the demands of an increasingly globalized market for legal services. This research, in turn, should form the basis for a whole new kind of pedagogy. At its core, this pedagogy should emphasize how organizational structures, norms, and practices shape individual careers and influence the practical meaning of substantive legal rules and professional commitments. Wilkins implies that law schools do relatively little to prepare their students for legal careers, but even less do they help law students understand “the large-scale economic, social and cultural forces that are reshaping the profession their students are about to enter;” See also Jack R. Goetz, “Interactivity Remains the Key to Successful Online Learning”, 2009, available at: <http://jurist.law.pitt.edu/lessons/lesnov00.htm> [accessed on April 1, 2013].

expression of power. Michel Foucault coined the term “power–knowledge” to indicate the close relationship between knowledge and power.⁶⁸ The Indian legal educational system, in a nutshell, need to adapt to strategic value addition of all available resources to foster a sense of reality. The 3G Plus institutions need to spell out their situational significance to the public at large. For that reason, introduction of various aspects of action plan need be included viz.,—Awareness on the importance of justice with focused emphasis on legal education, research, and awareness; Cater to the creation of viable and quality resources for enhancing the skills of the legal and judicial components (the students of law, the lawyers and advocates, the solicitors, the drafters and the judges); Management of the databases for faster retrieval and documentation; Development of innovative technologies by utilizing the results of advances in technologies in the most productive manner to facilitate faster legal research, brief preparation and analysis of judgments; Creation of an environment for competitive trends in creation of new legal products and services; The management of legal technology and innovative trends that aim to maximize the cost-effectiveness of investments in technology development and ultimately contribute to the legal enterprise value; Strategic Intellectual Property (IP) Value Creation; Strategic Licensing and Technology Commercialization; Strategic IP Enforcement; IP Acquisition and Inbound Licensing; Strategic Marketing of Ideas, Brands and Capabilities; and Strategic quality analysis using a balanced scorecard.

⁶⁸He insisted that the production and dissemination of knowledge is always an expression of power, and that the expression of power always involves the production and dissemination of knowledge. Foucault described how discourses designate the conjunction of power and knowledge: it is through discourses that the production of knowledge takes place and through which power is exercised and power relations are maintained. Discourses seek both to inform and influence, both to educate and dominate. They tell subjects about themselves and about the world, and also construct that world and determine its subjects. It is power–knowledge, in the form of discourse, that determines what is allowed to be said and thought within a discipline, and “who can speak, and when, with what authority.” Each legal education discourse, then, is simultaneously a category of statements about the teaching of law and an expression of power within the law school seeking to achieve a range of objectives, including the normalization of a particular approach to the teaching of law, the enhancement of the status of a particular type of legal scholar and the establishment of a regime of truth. The six discourses compete with each other to dominate the discursive field of Australian legal education, deploying a range of strategies including the propagation of particular constructions of “critique.” See also Roger Cotterrell, “Why Must Legal Ideas be Interpreted Sociologically?”, 25 *Journal of Law and Society*, 1998, at 171; David Nelken, “Blinding Insights? The Limits of a Reflexive Sociology of Law”, *Journal of Law and Society*, 1998, at 407; the notion of “legal culture” may be one solution to this challenge, David Nelken, “Using the Concept of Legal Culture”, 29 *Australian Journal of Legal Philosophy*, 2004, at 1; Jeremy Webber, “Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken”, 29 *Australian Journal of Legal Philosophy*, 2004, at 27.

Chapter 39

Legal Education in Nepal: Recent Reform and Need for Change

Bibek Kumar Paudel

1 Introduction

In the era of globalization, legal education requires highly qualified, trained and well equipped human resource as lawyers, judges and academicians having considerable knowledge of law with the sense of humanity. Legal education is an instrument which trains law professionals to contribute to the all-round development of the society. The native legal system needs to be reformed and modernized through legal education to cope with the problems arising due to the emergence of multinational trading organizations. Government and private sector require highly educated and well-trained law professionals, which can only be built by introducing proper legal education. Modern legal education has developed various methods and techniques of teaching for preparing efficient human resource. It is supposed to provide comprehensive theoretical knowledge and structured professional training in law through the University education.

Countries around the world have introduced and developed curriculum and considerably changed the methods of instruction. It goes without saying that legal education shapes and develops the legal system of a country. In this context, the chapter presents the picture of legal education in Nepal and argues for necessary changes. It is strongly felt that comparative study of the different legal systems is an essential part of curriculum of the law and must be incorporated at the earliest.

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2 Objective of Legal Education

Generally, education should be based on the analysis of need of a country. Education is a process, with the primary objective to bring positive change in human behaviour. In other words, education, generally, should have the objective to teach the way of living, to enable to learn, to bloom the internal talent, to bring positive change in attitude, to enlighten to love and respect human values and lives, to enable to earn for the prosperity and to enable to return to the society at large. Likewise, the legal education, specifically, should have the objective to produce lawyers for ensuring justice; therefore, legal education should stand for enhancing human sensibility and injecting a sense of human liberty and equality in the lawyers. Therefore, the prime goal of legal education is not only to produce professional lawyers but also to produce academic lawyers having theoretical knowledge for ensuring social justice and liberation.

A professional lawyer, without theoretical knowledge, cannot contribute to the cause of development of society. Lord Macaulay's expression that 'some great English judges became great because they spent a few more years in the University struggling with the works of Cicero and Thucydides rather than spent their time in drafting plaints and petitions', rightly emphasizes the importance of theoretical knowledge of law imparted by the Universities. Nonetheless, practical professional skills for drafting complaints and petitions as well as litigation procedures are also important and are required. The goal of legal education must be to train skillful law professionals highly equipped with theoretical and practical knowledge of law of the country and abroad. Hence, the responsibility of legal education is very profound. It should train lawyers as healer and social engineer to preserve the just society by balancing the conflicting interests. The objective of legal education should be to learn; to earn; and to return.

The objective of Nepalese legal education is to supply learned, competent and audacious lawyers; to develop an independent, impartial and competent judiciary; and to produce eminent scholars and jurists.¹

3 Brief History of Legal Education in Nepal

The then Prime Minister Jung Bahadur Rana, after his return from Europe visit, established English School to teach English in 1854 AD. The school was not open to the general public, it was only for children of Ranas. This school was started in Thapathali Palace of Junga Bahadur. It was under the control of Ranas and lasted for 38 years. This was the first formal school, in the history of education in Nepal, which was initiated at the government level. This school was called Durbar School.

¹Speech of Balaram Kafle on Behalf of Faculty of Law in a Seminar Conducted by Institute of Law, 1(2) *Nepal Law Review*, July–September 1977, at 9.

The curriculum of English Education System of British India was adopted by this first formal school of Nepal. Later on, this school was opened for general public and renamed as Durbar High School with the special initiation of, the then Director General of Public Instruction, Dhir Shamsher. This Durbar High School was affiliated to the Calcutta University of India. In 1877; a *Sanskrit Pathashala* was established, which had the programme of *Madhyama* (certificate level) and curriculum of this programme was based on the curriculum of Government Sanskrit College of Banaras, India and students had to go to Banaras for the final examination.

In 1901, Dev Shamsher came into power.² He established 16 schools, popularly known as *Bhasha Pathashala* (Vernacular Schools), for the exclusive study of Nepali language, in the country within the 1 month of his regime with the initiation of Bajhangi King Jaya Prithvi Bahadur Singh. Some arrangements were made for conducting two pass examination systems which refer to the completion of two papers.³ This two pass exam system included two papers in law, which was the first legal education at school level in Nepal.

In 1905, the first elementary school for legal training, popularly known as *Sresta Pathshala* was started. The main objective of this school was to produce clerical level-trained human resource like: *Lekhandas* (draftsman of plaints and petitions), *Srestedar*, *Bahidar* etc. working for the administration of justice.⁴ This school had introduced two papers of law. The original two pass exam system was elevated to eleven pass gradually by aiding three, four, five, eight, nine and eleven pass.⁵ A book on the procedure of thumb impression was written by Master *Hari Gopal Banarji, M.A.*; which was published in Nepali Paper in 1920. Another text book on ‘Thumb Impression’ was published in 1920 by *Gorkha Bhasha Prakasini Samiti*, which was written by Master *Durga Prasad Upreti*. *Gorkha Adalati Shikhsya Pahilo Bhaga* (Gorkha Court Education, Vol. 1) and *Gorkha Sresta Shikhsya Pahilo Bhaga* (Gorakha Legal Education, Vol. 1) were also published in 1921 and 1922 respectively.⁶ Various other text books on law were also published in 1922.⁷ The pass system was converted into *Prathama* and *Madhyama*, which lasted till 1961. In 1964, *Sresta Pathshala* was abolished since the curriculum of this school was not reformed in the changed context of Nepal.

²J.B.R Purushottamshamsher, *Shree 3 Haruko Tathyā Vrittanta*, (Vidyarthi Pustak Bhandar, Kathmandu, Vol. 2, 1992) at 3.

³*Prospectus: Bachelor of Law*, Institute of Law, TU, Tribhuvan University Press, Kathmandu, 1983, at 19.

⁴Ibid.

⁵Ibid.

⁶Rewati Raman Khanal, “Prescribed Curriculum for Legal Education and Ways and Suggestions for Quality Reform”, 1(2) *Nepal Law Review*, Institute of Law, July–September, 1977, at 23, quoting History of origin and development of Sresta Pathshala, 2000, at 1, unpublished, available through Master Merunath Pandey.

⁷Prakash Osti (ed.), *Some Historical Documents Relating to Law*, Lawyers Club Kathmandu, 2006, at 511.

Since 1956, the curriculum of *Ain-Sresta*, as an optional paper on law and procedure of 50 marks, was also introduced in School Leaving Certificate (SLC), which continued up to 1971.⁸ The objective of *Ain-Sresta* was to impart elementary knowledge of law.

Legal education at University level was introduced in 1954 with the objective of producing low-level clerical human resource in Nepal. The Nepal Law College was established for the first time as a private initiative, which was affiliated to Patna University of India, on 21 October 1954.⁹ The founder professors of the college were Ram Raj Pant, Ratna Bahadur Bist and Ashutosh Ganguli.¹⁰ The college started to produce law graduates in the country, however, the courses of study consisted of, for the most part, theoretical papers on law and some Indian laws.¹¹ The classes were conducted in the evening as part-time classes.¹² This was the first law college which started to teach modern principles of law in Nepal. The examination centre was established in Nepal for the final examination of students of Nepal Law College but the result was published from Patna. The first result was published in December issue of 1955 of ‘The Indian Nation’, which was published from Patna, India.¹³

Nepal Law College was de-affiliated from Patna University and placed under Tribhuvan University,¹⁴ which was established in 1959.¹⁵ The curriculum of Legal education was revised and some papers on Nepalese laws were inserted for the first time in University-level legal education.¹⁶ However, the curriculum had included only theoretical papers and did not include any practical courses.¹⁷

In 1965, private examination system in law was introduced, which increased the number of students that contributed in blurring the objective of legal education since private examination system exempted students from regular classes. Private examination system existed up to 1996 unless LL.B. and LL.M. courses were introduced.¹⁸

In 1972, under Tribhuvan University, Institute of Law was established and legal education was reorganized under the National Education System Plan (NESP). The objective of the NESP was to produce competent human resource in order to meet

⁸Institute of Law, TU, Information Book: Certificate Level, Lalitpur, 1978, at 2.

⁹Monument, pasted on wall of Building of Nepal Law Campus.

¹⁰*Supra* note 7.

¹¹*Supra* note 3, at 20.

¹²*Supra* note 8, at 2.

¹³*Supra* note 7.

¹⁴Curriculum Development Centre, TU, Master of Laws (Curriculum), Tribhuvan University Press, Kathamndu, 2009, at 1.

¹⁵Available at: <http://www.tribhuvan-university.edu.np>.

¹⁶*Supra* note 11, at 20.

¹⁷*Supra* note 8, at 2.

¹⁸Chandradhar Upreti, “Legal Education in Nepal: Theoretical Introduction”, 1(2) *Nepal Law Review*, July–September, 1977, at 40.

the country's development goals. Accordingly, under Institute of Law, two level programmes on law, a 2-year Certificate in Law (C.L.) after School Leaving Certificate and a 3-year Diploma in Law (D.L.) after passing C.L., were commenced. These two programmes together covered a period of 5 years after School Leaving Certificate (S.L.C).¹⁹ It made a great breakthrough in the legal education system in the country by incorporating Nepalese laws in the course of study. In the process of implementation of the NESP, the Institute of Law was made responsible for formulating plans and policies to promote the cause of legal education in the country and also to undertake academic activities in the legal sector. Under Institute of Law, the then Nepal Law College was renamed as Nepal Law Campus in 1972 as central campus and subsequently, various constituent colleges were established to impart legal education to achieve the National goal as sought by NESP in the different development regions of the country.

In 1984, Tribhuvan University (TU) began the task of making overall structural changes and readjustments and Institute of Law was converted into the Faculty of Law. The then prevailing semester system of examination, introduced by NSEP, was also superseded by the annual examination. The Certificate in Law (C.L.) got renamed as Proficiency Certificate Level in Law (P.C.L.) and the Diploma in Law (D.L.) as Bachelor's Degree in Law (B.L.).²⁰ With the restoration of multiparty democracy in 1990, TU again started restructuring higher education in law. A new 3 year after graduation Bachelor of Laws (LL.B.) programme was introduced which replaced a 3-year Bachelor's Degree in Law (B.L.) programme in 1996. Consequently, P.C.L. and B.L. were phased out after the introduction of Bachelor of Laws (LL.B.) and Master of Laws (LL.M.) in 1996. The need of abolition of P.C.L. was felt from the beginning of its commencement.²¹ The rationale behind the introduction of these courses was to develop critical thinking, humanistic values and holistic perception in law students which were needed for the modern society. In February 2009, the curriculum of LL.B. and LL.M. were completely changed to respond to the needs of twenty-first century as well as to accommodate the new development in law, justice and political system of the country.²²

In 1999, Kathmandu School of Law was established to impart legal education in private sector with the affiliation of Purvanchal University offering LL.B. and LL.M. programmes.²³ Purvanchal University revised the courses and LL.B. degree was renamed as B.A.LL.B. in 2011.

Tribhuvan University, Faculty of Law, has introduced a new 5-year B.A.LL.B. course from 2010 in order to make legal education compatible with changed national and international context. The course, basically, aims to enrich law

¹⁹Supra note 3, at 25.

²⁰Supra note 14, at 2.

²¹Speech of the then Justice of Supreme Court of Nepal, Vasudev Sharma, in a Seminar Conducted by Institute of Law, 1(2) *Nepal Law Review*, July–September, 1977, at 16.

²²Ibid.

²³Available at: <http://www.ksl.edu.np>.

students with comprehensive theoretical and practical knowledge in indigenous as well as foreign legal traditions, lawyering skills and research to meet the challenges of the age.²⁴

In 2012, Tribhuvan University, Faculty of Law introduced another 3-year LL.M. course in the morning shift. This programme seeks to impart highly academic knowledge to those students who cannot give their time for a 2-year full-time LL.M. in daytime. Recently, Higher Secondary Education Board of Nepal has introduced two papers of law as optional subjects each in grade 11 and 12 in the name of General Law in 2008. Consequently, an additional paper of law is also inserted in grade 12 by HSEB from 2013. The objective is to provide elementary knowledge of law at this level.

4 Existing Programmes for Imparting Legal Education in Nepal

Currently, Tribhuvan University, Faculty of Law has five programmes namely: an after graduation 3-year LL.B., a 5-year B.A.LL.B., a 2-year LL.M., a 3-year LL.M. and Ph.D. Ph.D. is being offered by Faculty of Law and other programmes are being conducted in the constituent colleges of Tribhuvan University. A 5-year B.A.LL.B. and a 2-year LL.M. programmes are also being conducted in one affiliated college of Tribhuvan University since 2012. Besides, Purvanchal University is also offering a 5-year LL.B. and 2-year LL.M. programmes under its affiliated Private Colleges since 1999. A brief discussion of these programmes have been done below.

Three Year Bachelor of Laws (LL.B.) Programme

The Tribhuvan University, Faculty of Law introduced a 3-year Bachelor of Laws (LL.B.) programme in the academic year 1996. The classes of LL.B. started since 1996 in ten constituent campuses and three private campuses affiliated to Tribhuvan University. However, the campuses having LL.B. courses have subsequently been reduced to six constituent Campuses.²⁵

In February 2009, a new curriculum was introduced, which replaced the old curriculum of 1996 since it was felt inadequate to respond to the needs of present national and international developments in law as well as the political and constitutional changes taking place in Nepal. The entire course was updated, improved and revised so as to make it in tune with needs of the nation.²⁶

²⁴Curriculum Development Centre, TU, B.A.LL.B. Curriculum (Tribhuvan University Press, Kathmandu, 2010).

²⁵Ibid.

²⁶Curriculum Development Centre, TU, LL.B. (Curriculum), Tribhuvan University Press, Kathmandu, 2009, at 3.

The course has the following curriculum objectives²⁷ to provide the students with in-depth knowledge of law and develop in them skills of reasoning, investigation, analysis and critical thinking, and practical skills necessary for legal career; to enable them to communicate and write legal documents in a clear and effective way; to convey to them knowledge of law in action and of the role of law in society and to enable them to handle complex legal situations effectively; to promote the values of justice, rights and liberty and to make the law graduates from Tribhuvan University able to compete with the law graduate from other universities; to broaden intellectual horizon and develop the personalities of law students; and to prepare middle-legal manpower for new roles in national development efforts and private sectors.

Methods of instruction for the course include lecture (exposition), case study, group discussion, simulation, moot-court, demonstration, role playing, workshop practice, independent study, observation, research activity, problem solving, etc.²⁸ However, lecture method is the most common and prominent method of teaching. Language of instruction is either English or Nepali or both as per the convenience of teacher.

Annual examination is conducted in accordance with the examination rules and regulations of Tribhuvan University for the purpose of evaluation. Students have to pass both theoretical and practical examinations.²⁹

Completion of Bachelor's degree (10 + 2 + 3) in any discipline or an equivalent programme recognized by Tribhuvan University is the requirement of admission. Selection criteria are determined on the basis of the marks and percentage obtained in the previous Bachelor's Degree in any discipline.³⁰ There is no seat limit in this programme for admission.

An appraisal of the programme will show the tendency of LL.B. Degree seeking students. It may also show the effectiveness of the programme. Data of the past 4 academic years have been analyzed which shows the number of admitted students, exam attended and passed students in each year throughout the course (Table 1).

In 2008 batch, altogether 1261 students were admitted in the first year and only 884 students were present in final exam. Among 884 students only 114 students passed in first year. Among the total numbers of students, only 70.10% students attended the final exam. Passing percent is 09.04 among the admitted students. In second year of the same batch, altogether 614 students were admitted and all were present in final exam. Among 614 students only 139 students were passed in second year. Among the total numbers of students, 100% students attended the final exam. Passing percent is 22.63 among the admitted students. In third year of the same batch, altogether 485 students were admitted and all were present in final exam. Among 485 students only 198 students passed in second year. Among the total

²⁷Ibid.

²⁸*Id.*, at 4.

²⁹Ibid.

³⁰*Id.*, at 5.

Table 1 Data of the academic years 2008–2012

numbers of students, 100% students attended the final exam. Passing percent is 40.82 among the admitted students. Among the total admitted students in the first year, only 48.69 and 38.46% students came to second and third year respectively.

In 2010 batch, altogether 1679 students were admitted in first year and only 1420 students were present in final exam. Among 1420 students only 162 students passed in first year. Among the total numbers of students, 84.57% students attended the final exam. Passing percent is 11.40 among the admitted students. In the second year of the same batch, altogether 1083 students were admitted and all were present in final exam. Among 1083 students only 297 students passed in second year. Among the total numbers of students, 100% students attended the final exam. Passing percent is 27.42 among the admitted students. In third year of the same batch, altogether 933 students were admitted and all were present in final exam. Among the total admitted students of this batch in the first year, only 64.50 and 55.56% students came to second and third year respectively.

In 2011 batch, altogether 899 students were admitted in first year and only 720 students were present in final exam. Among the total numbers of students, 80.08% students attended the final exam. In second year of the same batch, altogether 531 students were admitted and all were present in final exam. Among the total numbers of students, 100% students attended the final exam. Among the total admitted students of this batch in the first year, only 59.06% students came to second year.

The dropout rate, in average, in an academic year is 21.75% in the first year. On the basis of the first year admission, dropout rate in the second and third year are 42.58 and 54.99% respectively. On the basis of above analysis, the average dropout rate is 39.77%, which shows that only 60. 22% students attend the final exam. The average passing percent is 10.22, 25.02 and 40.82% for the first, second and third year respectively. Total passing percent in average is only 25.35%.

On the basis of above analysis, one may conclude that LL.B. Programme is not proving to be effective in rendering the practical and skillful legal education. A unlimited number of admission, frequent absence of students from classes, no special scheme and plan to regulate the classes are the major causes of failure of the programme. Therefore, admission system and class regulation scheme needs to be modified. Entrance system must be introduced in this programme. Only limited seats must be offered. It is below those 100–150 students in three sections comprising 50 students in each section shall be the ideal situation for the effective education.

Five-Year B.A.LL.B. Programme

The Tribhuvan University, Faculty of Law, introduced a new 5-year B.A.LL.B. Course in 2010, in order to make legal education compatible with changed national and international context. The course aims to enrich law students with comprehensive theoretical and practical knowledge in indigenous as well as foreign legal traditions, lawyering skills, and research skills to meet the challenges of the age. This type of course is also being conducted by Purvanchal University.

The main objectives of this programme³¹ are: to produce human resource equipped with necessary skill, competency and integrity; to impart sense of responsibility towards society, nation and the world; to produce human resource for respecting human life and values; to develop a base of legal excellence with international and indigenous understanding; to promote research and understand insights of law and society; to prepare competent human resource in the field of law and justice; and to inculcate legal knowledge from socio-cultural and developmental perspective.

B.A.LL.B. is a full-time 5-year course. Classes are being conducted in the day time. A teaching period is of 1 h for each subject. The numbers of classes are of 4 h for 100 marks and 2 h for 50 marks subjects per week.³²

Teaching strategies consist of lecture, case study, discussion, question-answer, problem solving, research, seminar, workshop, tutorial and self-study. The important features of teaching include inter-disciplinary approaches, participatory and instructional materials include power point, overhead projector, white board, note books, teaching guides, case materials etc.³³ The language of instruction is exclusively English. Visiting faculties include the eminent professors, experts, law personals from Nepal and abroad are also invited.

Those students who have completed +2 or equivalent can apply for this course. Seventy seats are available for 35 students in each section. Eleven seats in each section, including two for woman, two for Indigenous/Janjati group, two for Madhesi, one for Dalit, one for disable, one for the backward area and two for foreigners are reserved. Any type of economic privilege is not available to those students who are eligible for admission for such reserved seats.³⁴

Internal and external evaluation in respective subjects is prescribed. Annual written examination is taken at the end of each academic year except for Clinical law, Seminar and thesis writing. No student is allowed to appear in the final examination unless she/he meets the attendance requirements and presents necessary term papers in each subject.³⁵

Two Year Master of Laws (LL.M.) Programme

The Faculty of Law started a 2-year Master of Laws (LL.M.) programme in 1996 for those who want to take a career as jurists, academicians, legal scholars, legal consultants and other legal professions. The programme is designed to orient the students towards research so that they can play a more constructive role in the development of law and the legal system in Nepal's new democratic set up.

The programme aims to promote and disseminate the knowledge of law and legal processes in the light of country's socio-cultural perspectives and developmental goals. To this end, the programme is designed to produce human resource

³¹Supra note 24.

³²Ibid.

³³Ibid.

³⁴Available at: <http://www.nlc.edu.np>.

³⁵Supra note 24.

possessing the essential skill, competence and integrity for assuming responsible roles in such a way that they can make positive contributions in the area of administration of justice and the functioning of a just, dynamic and democratic society. This course envisages to inculcate in the minds of the students a strong sense of responsibility towards society and a great sense of respect for humanity and at the same time develop in them highest standards *inter-alia* of professional behaviour and a spirit of dedication for welfare of the people and the betterment of their life style.³⁶

This LL.M. programme is crucial for achieving the goal of legal excellence backed by a body of highly trained jurists, scholars and lawyers of national standing as well as of international status in Nepal. It is believed that the LL.M. course will be able to enrich law students with firm grounding in Nepal's legal traditions, research and recent development in the world. The LL.M. programme is also being offered by the Purvanchal University, however, course details are different.³⁷

The main objectives of LL.M. programme³⁸ are: to impart legal knowledge from socio-cultural and development perspective; to produce manpower equipped with necessary skill, competence and integrity; to inculcate in students a sense of responsibility towards the society, the nation and the world and respect for human life; to develop a base of legal excellence with international and indigenous understandings; to promote research by the faculty and the students in order to understand the insights of law and justice; and to prepare legal scholars, jurists and academicians to enter the professions of law teaching, research, judicial and government services and legal consultants for public and private enterprises.

The method of teaching includes lectures, discussions, case study, tutorial, self-study, question-answer, case studies, research, workshop, seminars, etc. The main features of the teaching method include inter-disciplinary approach, and Socratic and co-operative (Participatory) method. Guest lecturers by eminent legal personalities of Nepal and abroad are the regular feature.³⁹

At the end of each academic year, in the courses prescribed except for Seminar and Thesis Writing, a written annual examination is conducted for both the first year and second year courses for the evaluation of the performance of students. The students have to pass each paper as prescribed in the course separately.

Applicants seeking admission to the course should face entrance examination except for foreign candidates. Candidates who have completed graduation in law are eligible to appear in the entrance examination for 50 seats.

A Three Year Master of Laws (LL.M.) Programme

The Faculty of Law started a 3-year Master of Laws (LL.M.) programme in 2012. The course of the 2-year programme is divided into three academic years. The objectives of this programme are same as that of the two year LL.M. programme.

³⁶*Supra* note 14.

³⁷*Supra* note 24.

³⁸*Supra* note 14, at 3.

³⁹*Id.*, at 6.

Admission criteria, evaluation system, grading system are also same. This programme is conducted in the morning on full fee basis. Only 35 students can get admission in this programme.

Ph.D. Programme

The Office of the Dean, Faculty of Law, is conducting Ph.D. programme on law since 1997.⁴⁰ In 1997, two scholars got enrolled for Ph.D., however, they did not complete their research. As per the record of faculty, altogether 63 scholars have been enrolled for the research and ten scholars have been awarded Ph.D. Only those scholars, who have published at least three research articles, can apply for Ph.D. Applicants should face the viva voce based on their proposals. A successful scholar can get admission for Ph.D. on the basis of his viva voce and evaluation of his published articles. On the completion of 3 years, the scholar can submit his report. Submitted report shall be duly evaluated by internal and external experts and after acceptance of his report by experts, he should face the viva voce. After being successful in viva voce, he will be awarded Ph.D., the highest degree in law, by the faculty of law.

5 Legal Education at Higher Secondary Level

In 2008, Higher Secondary Education Board of Nepal (HSEB) introduced the course of General Law in Grade 11 and 12. Altogether 3 papers of law, one in grade 11 and two in grade 12, are introduced at this level, however, these papers are optional as per the HSEB scheme since only English and Nepali language subjects are compulsory and rest of the subjects are optional. The objective of this course is to inculcate elementary knowledge of law at this level. General objectives of the course of grade 11: acquaint the students with the general principles of law, Nepalese law, legal status of person and liability; inculcate in them necessary knowledge of constitution, fundamental rights, structure of the states, formation and separation of power of the organs of the government in Nepal; provide them with adequate knowledge and information of human rights, human rights instruments, Nepalese efforts towards protecting and promoting human rights and fundamental freedoms; and equip them with basic knowledge of general laws and constitution of the country.

Likewise, the general objectives of the course of grade 12 are to: impart and equip the students with the basic knowledge of substantive law (Both criminal and civil) and principles of procedural law; acquaint them with the general introduction of legal drafting; inculcate in them basic skills of preparing model of law-suit (complaint), FIR, charge sheet, model of defence, preparation of models of documents such as deed of transfer of ownership, deed of mortgage in the sight of asset, loan deed, deed of residuary will probate and so on; and impart them basic

^{40.}“Kantipur”, *Nepali National Daily*, November 16, 1997.

knowledge of the major crimes, principles of criminal law, elements of crime, property law, family law and contract law, principles of procedural law, jurisdiction of courts and court proceedings.

It is pertinent to note that these courses are not being offered by most of the junior colleges and students are also not attracted to these courses. Few colleges are offering these courses but the number of students is very small, the reason is that there is no immediate utility of this course. The course does not create any job opportunity. For the sustainability of this course, the state should formulate the policy to create job opportunity by setting grade 12 in law as a qualifying degree for a clerical job at least in judiciary.

6 Problems of Legal Education in Nepal

Legal education of Nepal has been facing a number of problems, since the beginning. Mere theoretical legal education does not meet the goal and objective of Nation. It requires practical knowledge to solve the real legal issues. State responsibility, traditional method of teaching, lack of Information Technology (IT) friendly knowledge, lack of refresher training to teachers, lack of research-oriented education system, easy certificate getting tendency of the students are some of the major problems confronting Nepalese legal education.

Problems

(a) *No Access and Low Access to Quality Reading Material*

Law schools/faculties in Nepal only provide theoretical knowledge of principles of English common law. Students do not have access to theoretical books and whatever is available, it is out dated. We are not being able to develop our scholars who can contribute in emerging field of law. Therefore no access and low access to quality reading material is one of the serious problems.

(b) *Practical Education is Given Low Priority*

The proper practical knowledge on law requires an adequate budget. The state does not appear to be committed to enhancing practical legal education, therefore, the objective of imparting practical knowledge of the law is not being achieved.

Lawyering skill cannot be developed only through the theoretical knowledge. The effort of providing practical skill like: drafting of legal document, observation of court room activities, placement in Private Law Firms is not successful due to the constraint of time, budget, a unmanageable number of students, etc.

(c) *Problem Relating to Methods of Teaching*

Our teaching method is outdated and traditional. Traditional type of lecture method is common, which would be monotonous for the students. Case study, discussion methods as the participatory method is not applied properly. Teachers and students

are equally responsible for the failure. Teachers feel convenient to give one-way lecture to avoid unnecessary debates and students are also not prepared on subject matters for the discussion due to their time constraints, economic constraints and other individual reasons.

(d) ***Poor Knowledge of Information Technology (IT)***

IT-friendly approach would ease the classes for teachers. But most of teachers are not IT friendly; therefore, they cannot use Power Point Presentation. Infrastructural deficiency is causing great trouble to students and teachers alike.

(e) ***Lack of Research-Oriented Education System***

The modern legal education requires more research-based study. Research-based study requires a proper budget, which is not allocated in our context. What ever researches are being done, they are only doctrinal. For the empirical research, sufficient budget must be allocated. No department is established to facilitate research activities in Nepal. Without institutionalized efforts, research cannot be carried out.

(f) ***Easy Certificate Getting Tendency of the Students***

Generally, most of the students of LL.B. and LL.M. require the certificate and not the knowledge, as most of them need the certificate as an extra degree which would support their promotion if they are government officials. Most of the students of LL.B. never come to the classes since they are already either job holders or students of other faculties; therefore, they are not sincere to the legal education, however, the same cannot be said about B.A.LL.B. students. Admission of LL.B. is open for graduates with no limitation on number of seats are some of the reason for easy certificate getting tendency of students in Nepal.

(g) ***Problems Related to Faculty Members***

The teaching faculties are facing various problems like: low salary, unavailability of quarters to the teachers, no refresher trainings, no special programmes for their career development, no support for academic activities. These problems hamper teaching activities.

(h) ***Insufficient Budgetary Allocation***

The budget allocation to the education sector by the government is nominal. It shows the government's reluctance to enhance the quality of entire education system. Such tendency of the government is one of the problems for legal education also.

Recommendations

On the basis of foregoing discussion, the following recommendations can be made for the betterment of the legal education in Nepal as well as in other SAARC countries:

(a) *Reform In Existing System*

Whatever problems are being faced in imparting legal education needs to be immediately addressed by the concerned authority. The following steps need to be taken for the betterment of legal education:

- i. Library must be well equipped including e-library ensuring availability of necessary reading/teaching materials.
- ii. Sufficient budget for research and other activities for practical knowledge must be allocated.
- iii. A separate research division must be developed under the faculty of law.
- iv. Regular orientation on various methods of teaching and refresher training must be conducted.
- v. Number of students in LL.B. level must be fixed and entrance exam for admission must be introduced.
- vi. Special programmes for the economic support to teachers and students should be developed.
- vii. Salary of the teachers must be made at par with other SAARC countries.
- viii. Faculty of Law should be developed as a residential faculty, therefore, quarters for teacher and hostels for students must be made available.
- ix. Special programmes for supporting academic activities of the teachers should also be conducted including: support for publication of books and research reports.
- x. Scholarship and fee exemption schemes for the teachers seeking Ph.D. must be introduced.
- xi. Special support programmes for research activities like: scholarship and other economic, educational and social security support should be started.
- xii. Teachers need to be full time scholars, therefore, necessary programmes for the same should be introduced.
- xiii. The existing courses of all programmes must be revised at par with other SAARC countries.
- xiv. The existing annual exam system should be replaced by semester system and the existing grading system should also be replaced by credit system.
- xv. Educational exchange programmes with various Universities of the World should be initiated.
- xvi. Some PG Diploma Courses in law in different subjects like human rights, juvenile justice, labour law, Alternate Dispute Resolution (ADR), company law, international trade law, intellectual property, etc., should be started by the faculty of Law.

(b) *Need to have Uniform Curriculum in the SAARC Region*

In this age of globalization and regional integration, laws are constantly being harmonized and unified on a global and regional basis, hence, SAARC laws need to be harmonized and unified. Comparative study for harmonization and unification of the SAARC laws is essential. Bogdan rightly opines that it is not possible to limit

the legal study within the watertight compartment of domestic law.⁴¹ Therefore, uniform curriculum at least at the SAARC level is the necessity of time which can be done on the basis of a comparative study of laws of this region. The comparative law provides the law students a dimension in the learning of law.⁴² It helps in the discovery of the models for preventing and resolving social conflicts developed by different legal systems of the world; extends and enriches the supply of solutions; offers critical capacity and opportunity of finding the better solutions as per time and place; gives rise to lively international exchange on legal topics; promotes international understanding; enhances law reform especially in third world countries; saves the future generation of lawyers from errors of complacency and self-satisfaction; and it is useful in legal practice to a lawyer to find a solution to a problem for which national jurisprudence may not have an adequate answer and provides employment opportunities in various agencies of UN and various governmental and non-governmental organizations.⁴³

7 Conclusion

Comparative law has an important function in legal education. Thus, it is required to be taught in the law schools, since it offers a dimension by which a law student can learn special legal cultures of others. A student of comparative law can help to improve the inconsistent native laws thus enabling the future generation to compete internationally. It must be included in university curriculum. The need of comparative study of different legal systems was felt during 1970s.⁴⁴ However, faculty of law inserted comparative law as a subject only in 2010 and 2011 in LL.B. and B.A.LL.B courses respectively. Students passing out without an adequate training in comparative law may not be able to contribute significantly to a discussion relating to major problems of modern jurisprudence, Roman Law, Hindu Law, Islamic Law, Civil Law and the regionalized and harmonized law of world. Therefore, the time has come to raise the voice in favour of uniform curriculum for the legal education at SAARC region, which will help a lawyer to come out from watertight compartment of domestic law, to remove national biasness, to make the law global and to reform national legal system. It is only if we are able to introduce such curriculum for this region, that we can claim that we are producing well-equipped and trained human resource who can solve the complex legal issues by selecting proper laws of the region.

⁴¹Michael Bogdan, *Comparative Law* (Kluwer Law and Taxation Publisher, Norway, 1994) at 27.

⁴²Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Clarendon Press, Oxford, 3rd ed., 1998) at 15.

⁴³S.N. Jain, "The Research Programme in Indian Law Institute", S.K. Verma and M. Afzal Wani (eds.), *Legal Research and Methodology* (Indian Law Institute, New Delhi, 2006) at 211; C.G. Weeramantry, *An Invitation to the Law* (Lawman Private Ltd., New Delhi, 2005) at 52.

⁴⁴A Speech of Sarbgya Ratna Tuladhar, the then Chairperson of Nepal Bar Association, in a Seminar Conducted by Institute of Law, 1(2) *Nepal Law Review*, July–September, 1977, at 12.

Chapter 40

Need of Clinical Legal Education in the Scientific Era

Jayadev Pati

Law is that flexible instrument of social order, which influences every human activity in a civilized society. Value-based pragmatic legal education is given importance in almost all the countries as a tool to ensure and foster economic development and to provide social justice to the people. However, the methodology and curriculum used by the legal fraternity in the world are to be revamped completely to make the legal education more humanistic, modern, contemporary and socially relevant. It is because in this era of science and technology, law is not being studied in its traditional form, rather it is considered as a branch of science which is to be tested through a method either to be proved or disproved.¹

At present in most of the countries, legal education is based on Western theories of right and justice. It is because of the fact that these countries are to maintain the scientific temper to protect and preserve their culture, heritage, custom and historical conditions. In order to create and maintain the basic philosophies and ideologies of just society, they have to develop their legal science for justice and fair play. Human sensibility can be enhanced and enriched only when the modern legal education will have a humanistic approach. At the same time, to train the law students to develop their skill and competence, a pragmatic value oriented legal education is to be provided, so that it would be easier for these students to identify the social problems in future properly and to find out solution for eradicating corruption, injustice, nepotism and poverty from the world at large.

Many theoretical methods have been adopted in the field of legal education.² In the present-day context, it is to be viewed from the social perspective. Till today,

¹Wittgenstein's "Tractus Logico Philosophicus" Back's "Perspectives in Social Philosophy", Glanville Williams, "The Controversy concerning the word Law", Scar Pali's "IL Problemi Della Difinizione Deldiritto".

²Harold D. Lasswell and Myres S. McDougall, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 *Yale L.J.*, 1943, pp. 203–267.

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most of the law schools of the world were following British pattern of legal education. Towards the last quarter of the nineteenth century, a changed methodology was introduced by the Harvard Law School, the leading exponent of which was Christopher Langdell. Though the traditional legal education was confined to class room teaching only with the aid of text books, journals, periodicals and reported cases, but now time has come when importance is being given to groom the students for the need of legal profession outside the classroom also.³ The traditional practice of theoretical study basing on non-clinical and para-clinical methods in the field of legal education will not be so effective. The law students need to be imparted knowledge and training on clinical legal education in this era of science and technology.

In the field of medical education only, as everybody knows, the method of teaching is the clinical method. In this study, a student is being trained to acquire the skill, knowledge and technique from his interaction with the patients, various investigations and laboratory examination reports so that he would develop the ability to administer appropriate treatment. In this process, the treating physician makes a diagnosis of the diseases and prescribes a remedy for the malady. All the branches of medical science are classified into three categories; (i) non-clinical, (ii) para-clinical and (iii) clinical. The clinical method is to be studied with the aid and advice of other two methods. For example—the subjects like Anatomy and Physiology are non-clinical subjects, in which a student is to acquire basic knowledge on different parts of the body, position and functions of organs and systems. The subjects such as Pharmacology, Microbiology and Pathology are known as para-clinical, which provide a feedback to the physicians for proper diagnosis and management of treatment for patients. Gynaecology, Medicine, surgery, etc. are known as clinical subjects in which the students are required to be trained so as to provide direct treatment for the diseases.

Like the medical education, the legal education is also to be imparted in the clinical method so as to cope with the modern-day complexities of the society.⁴

In fact, clinical method is the need of the hour, which is not only a pedagogical method but also the philosophy about the role of lawyers in the society. It is a liberal, radical and reformative method having the programmes in the process of development. This method can make the legal system a vehicle for change. The clinical legal education programmes provide a context for testing legal theories.

³For more detailed discussion see Mark Spiegel, "Theory and Practice in Legal Education: An Essay on Clinical Education", *34 UCLA. L. Rev.*, 1987, at 577.

⁴"The Displacement of Traditional Law in Modern India", *XXIV Journal of Social Issues*, 1968; "The Study of Indian Legal Profession", *III Law & Soc. Rev.*, 1968–1969 at 201; "The Aborted Restoration of Indigenous Law in India", *Comparative Studies in Society and History*, 1972; "A Note on Contrasting Styles of Professional Dualism: Law and Medicine in India", in Milton Singer (Ed.), *Entrepreneurship and Modernization of Occupational Cultures in South Asia* (Program in Comparative Studies in Southern Asia, Duke University, 1973).

This method not only sensitizes the law students towards ethical and moral responsibilities to perform pro bono public work, but at the same time creates interest in them to provide services to the community through public interest lawyering.

Various methods could be adopted to train the students in the practical field such as Lok Adalat, Legal aid clinic, Legal literacy project, direct representation of clients before selected courts, tribunals and agencies. Some other activities, such as legislative drafting and community participation can also be chosen.

Though it is quite difficult to classify the law subject in different categories, broadly they can be classified into (i) Non-clinical and (ii) Clinical subjects. The Para-clinical subject such as inquiry, investigation, medical report and expert opinions are intertwined with clinical subjects. The objective of clinical legal education is to develop the perception, the attitudes, the responsibility and the skills to become a lawyer after the completion of the course from the law schools. Students are being given the training to acquire knowledge in the non-clinical subjects like language, history, economics, political science, sociology and philosophy. This would motivate a student of law to undertake the responsibility to face the complicated problems and to analyze the fact with the help of the study in literature, arts, science, economics, commerce and other relevant subjects. The non-clinical legal education needs a systematic flow of knowledge and functional skill.

The curriculum for clinical legal education has been adopted in such a manner as to meet the challenges of newly emerging areas of Intellectual Property Rights, Environmental Protection, International Trade, Taxation Law, Liberalization and Privatization of Corporate Economy, and Labour Laws conducive to development of Trade and Industry. The curriculum for clinical legal education is focusing on the problems of the common masses. It is sensitizing the society to identify its problems and brings social and economic justice. Special emphasize is being given to research, relating to protecting rights of people and national interest in the area of environmental protection, bio-diversity, trademarks, patents and other emerging branches of law and agreement of World Trade Organization.

The concept of clinical legal education started in the United Kingdom in the year 1970 with the operation of legal clinic started at University of Kent.⁵ The Queen's University Belfort provides a model for working with a number of advice centres. The Warwick University has adopted simulated clinical techniques. The Columbia University's professional law course uses simulated clinical methods to develop a critical approach to professional ethics. Similar developments have taken place in Australia, Canada, India, Malaysia, South Africa and south Pacific. In Canada and Australia, the Governments have recognized the value of clinical legal

⁵The Kent Clinic see W. Rees, "Clinical Legal Education: an Analysis of the University of Kent Model", 9 *Law Teach*, 1975, at 125; we are pleased to report that the clinic is now alive and well again. A recent article describing their work in a specialized community mental health law clinic is described in K. Diesfeld, "Clinical Legal Education and Training", 7 *Legal Action*, 1977.

education.⁶ In India the clinical legal education has been introduced in the courses of studies of all the National Law Universities and Law Colleges from the academic session 1995–1996. This clinical course is classified into two categories; (a) Foundation clinical course and (b) Optional clinical course. The foundation clinical course is compulsory for all the students of law, whereas the students are to opt for any two optional clinical courses as per the courses of studies of the University. The foundation clinical course is to provide training on client counseling, client interview, mediation, negotiation and trial advocacy. They are also to be trained in alternative dispute resolution mechanism and case planning. In the optional clinical legal education, a student has to visit the courts and other dispute resolution bodies. In the U.S.A. the clinical methods are widespread and better established.⁷

Now every nation is giving importance to the clinical legal education in order to groom their future lawyers, the law makers, the executors, law officers, judges and law teachers to acquire knowledge through a scientific method keeping pace with the ethics and philosophy of the society. The objective of the clinical education is radical, reformative and dynamic.⁸

The following are the basic features of the clinical legal education.

- The students are to experience the impact of law on the life of the people.
- The students are to be exposed to the actual milieu in which dispute arise and to enable them to develop a sense of social responsibility in professional work.
- The students are to be acquainted with the lawyering process in general and the skills of advocacy in particular.
- The students are to critically consume knowledge from outside the traditional legal arena for better delivery of legal services.
- The students are to develop research aptitude, analytical pursuits and communication skills.

⁶This prediction is supported by the experience of a significant and growing number of legal educators in both the UK and other common law jurisdictions, notably Australia, Canada, India, South Africa and the USA. The importance of a hands-on approach to learning law has also been noted in recent Professional and Governmental Reports. See Arthurs Report, Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada (Consultative Group on Research and Education in Law, Ottawa, 1983); Pearce Report, Pearce, Campbell and Harding, Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (Australian Government Publishing Service, Canberra, 1987); Mac Crate Report, Legal Education and Professional Development- An Educational Continuum: Narrowing the Gap (American bar Association, Chicago, 1992); ACLEC (Lord Chancellor's Advisory Committee on Legal Education and Conduct), First Report on Legal Education and Training (ACLEC, London, 1996).

⁷Real-client clinics are compulsory at City University of New York, University of Montana, Washington DC School of Law, University of New Mexico; Simulation clinics are compulsory at University of Hawaii, Thomas Cooley School of Law.

⁸For a study of the potential clinical approaches which may be applied to more conventional forms of classes see. J. MacFarlane, *An Evaluation of the Role and Practice of Clinical Legal Education with Particular Reference to Undergraduate Legal Education in the UK*, Ph.D. thesis, South Bank Polytechnic, 1988. M. Le Brun and R. Johnstone also explore teaching methods which promote learning in The Quit (R)evolution (Law Book Co., 1994) Ch. 6.

- They are to understand the limit and limitations of the formal legal system and to appreciate the relevance and the use of alternate modes of lawyering.
- They are to imbibe social and humanistic values in relation to law and legal process while following the norms of professional ethics.

Clinical legal education requires students to take an active part in the learning process. They assume a degree of control over their own education and they see the law in its real-life context. Learning by doing exposes students to real or realistic settings in which both basic concepts and substantive rules can be studied. At the same time, students may address the practical, ethical and policy issues surrounding a given problem. The clinical legal education programme is providing a vehicle for the introduction to an enhancement of skills relevant to the study and practice of law. Students taking clinical courses are encouraged, as an explicit educational objective, to reflect critically on the content of the experience and to redefine their needs and strategies in consequence.

Clinical education has a broad range of impact upon law students. The objectives of clinical work fall basically into five areas:

(a) *Legal Skills Development*

Training is necessary for law students to develop skills in writing and in legal research. In the recent years, the law schools are giving much emphasis on legal writing, preparation of memorandums, deeds, documents, appellate briefs, analysis of problems and pleadings. The underlying rationale behind these activities is the inculcation of research skills and also to develop writing skill during the early career of a law student. This foundation would help them to be proficient in any branch of law.⁹

(b) *System—Operation Knowledge*

The law students obtain the skill development benefits of actual participation as well as they are prompted to understand critically and systematically the mechanism of operation from the institution in which they are participating. Institutional exposure enables the students to evaluate more carefully the recent literature concerning the field of legal institution. All the law schools are to develop a system to enable the students to acquire knowledge through first-hand observation.¹⁰

(c) *Growth of Professional Responsibility*

The courses on legal education are incomplete without knowledge on ethical issues. Sometimes the students complain of non-relevance of the course.¹¹ But new

⁹Wigmore's chart analysis has been revived by William Twining in "Taking skills seriously" in N. Gold, K. Mackie and W. Twining (eds), *Learning Lawyers' Skills* (Butterworths, London, 1989).

¹⁰R. Grimes, "Reflectins on Clinical Legal Education", 29 *Law Teach*, 1995, at 169; H. Brayne, "Law Students as Practitioners", in J. Webb and C. Maughan (eds), *Teaching Lawyers' Skills* (Butterworths, London, 1996).

¹¹C. Maughan and J. Webb, *Lawering Skills and the Legal Process* (Butterworths, London, 1995).

insights can be created through clinical programmes, where students are engaged in actual cases rather than the dramatic learning experience of classrooms. To find out a solution to a problem forces the student to choose among values, including his emotional consideration.

(d) ***Self-Knowledge***

Learning about one's self is a continuous process. From professional point of view, self-knowledge is important in understanding one's abilities and limitations. In the clinical programme, the students are encouraged to analyze, probe and evaluate their performance in the real life they encounter. Students can confront and accept, modify or reject or at least recognize the existence of values that will guide their professional lives and reactions to people and problems.¹²

(e) ***Human Relations Understanding***

The practice of law cannot be accomplished in isolation without interacting with the people. The students are to be trained in order to develop their zeal for logical purity and not to ignore the human aspect of legal problems. Clinical legal education programme provides an opportunity to prescribe remedy for this omission. Developing keen lawyer-client skills concomitantly results in gaining an understanding of how human beings are inter-related. Similarly, acquiring knowledge about one's self in the context of law practices involves learning about human relations.¹³

Clinical legal education may simply be described as learning law through application, practice and reflection. It is quite different from traditional legal education. The lecture-seminar method so common in education of law students are predominantly content and assessment led; they consist too often of students being given information. It is unusual for lectures to meet any of the clinical demands. They rarely involve students in the real or realistic practice of the law. A well-structured lecture and seminar programme, using group work, presentations and case studies, and achieving a higher level of student interaction and participation, is of course of value as a learning experience. However, unless it goes beyond the passive involvement of students, a learning opportunity can be missed. Law schools need an integrated student-centred approach through the following types of clinics.¹⁴

¹²D. Boud, "Some Competing Traditions in Experiential Learning" in S.W. Weil and I. McGill (eds), *Making Sense of Experiential Learning* (Open University Press, 1989).

¹³D. Woods, "Problem Based Learning and Problem Solving", in D. Bound (ed.) *Problem-Based Learning in Education for the Professions* (Higher Education Research and Development Society of Australasia, Sydney, 1985) quoted in D. Cruickshank, "Problem-Based Learning in Legal Education" in J. Webb and C. Maughan (eds), *Teaching Lawyers' Skills* (Butterworth, London, 1996).

¹⁴Contemporary debates in the US clinical movement centre on the objectives, form and content of clinical programmes. Resourcing, assessment, ethics and standards also feature.

- (a) In-house real-client clinics, which would provide practical knowledge to the student. They are to be associated with advocates to acquire practical experience.
- (b) Out-house real-client clinics, where the students are to visit different places, particularly the village and slum areas where problems are to be identified and the remedial measures can be provided to the illiterate and ignorant inhabitants.
- (c) Simulation clinics, which would help in educating the students to acquire knowledge from the similar cases which have been decided in the courts of law.

The objectives of above-mentioned clinics are to provide exposures to students of law in their practice. They need to reflect on the experience and the process and result of that reflection are central to all clinical programmes. Clinical legal education is directed towards developing the perceptions, the attitudes, the skills and the responsibilities which a lawyer is expected to assume when he completes his education from the law school.

There is a certain richness that can be brought to a clinical experience only by involving law students in real legal issues as a central element of a clinical course or programme. However, it is not enough to simply put students into a real situation to learn the real work of the clinical methodology, the system must refine the students to gain experiences in order to maximize their effectiveness, and also to supplement their clinical experiences with appropriate instructions and supervision in order to create the maximum opportunities for learning.

Law and lawyers have a great role in the society. In every society, there is a wide gap between the people and the justice delivery system. The need of the hour is to attach importance on causes of the poor and down trodden.

Ethics in the legal profession refers to a system of moral principles, a sense of right and wrong and goodness and badness of action and their motive and consequences. It refers to the application of ethics to a legal profession. To be more specific, legal and professional ethics is the study of good and evil, right and wrong, just and unjust. Ethics in legal profession corresponds to basic human needs. It is a human trait that every individual desires to be ethical, not only in his private life but also in his professional affairs. Most of our legal professionals want to be a part of our society, in which they can command respect and be publicly proud of their profession, because they perceive their purpose and activities to be honest and beneficial to the society.¹⁵

It is a multidimensional training which includes, participation in court proceeding and tribunals to develop the art of advocacy, to learn the court practice, procedural norm and to understand how legal process works. The need of the hour is to set up legal clinics in the law school premises, so as to create space for the students of law to get practical training. They need to understand the importance

¹⁵H.L.A Hart, *The Concept of Law* (Oxford, 1961); Lon L. Fuller, *The Morality of Law*, (Yale University Press, New Haven, 1972); H.L.A Hart, *Law, Liberty and Morality* (Oxford University Press, London, 1963); P. Devlin, *The Enforcement of Morals* (Oxford University Press, London, 1965).

and the potential utility of clinical legal education and to implement the programmes effectively and systematically.

Law protects those who protect it and destroy those who destroy it. According to Friedman, 'The aim of legal education cannot, if it is to serve a positive and useful role in modern society, be confined to teach the legal techniques and skills but to make product of law as an instrument of progress through democratic process. It would be tragic if the law were so petrified as to be unable to respond to the unending challenges of evolutionary or revolutionary changes in society'.¹⁶ The legal education should emphasize upon morality, honesty, self-accountancy, patriotism, self-sacrifice, and compassion with all the living beings. Law without morality is like a body without soul. Unless moral ethics are given due emphasis, no amount of legislation can bring peace and prosperity in the society.

¹⁶W. Friedmann, *Legal Theory*, (Stevens & Sons Ltd., London, 5th ed., 1967) at 289.

Chapter 41

The Landscape of Legal Pedagogy in India: Issues and Challenges

Ritu Gupta

1 Introduction

The end of law is not to abolish or restrain but to preserve and enlarge freedom. For in all the states of created beings, capable of law, where there is no law, there is no freedom

—John Locke

Law has unarguably been one of the most fundamental as well as distinguished feature of any civilized society since the inception of the civilization itself. It is law that decides everybody's rights, duties and disputes that may arise as a result of any conflict with respect to the exercise of previous two postulates. Beneath what appears to be simply fair or unfair decision, there exists a complex matrix of cultural and social practices intertwined with legal pedagogic experiences, explanations and interpretations. Hence, Legal Education has its unique importance in the justice delivery mechanism of any country.

The landscape of Legal Education in India is fraught with vivid seminal issues and challenges. More often than not, institutions and teachers imparting formal education to future professionals have faced criticism for producing half-baked lawyers. Training law students to be professionals of tomorrow is indeed a daunting task. The *practice versus theory* debate has been a salient feature but in view of the recent developments it has become more prominent than ever. Independently, both the law schools as well as the legal profession move in the same direction but convergence on certain critical issues is usually missing between the two.

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2 Historical Background of Legal Education in India

Indian Legal System has perhaps been one of the most ancient legal systems of the world. A very logical and comprehensive body of law has been developed here since ancient times. One of the essential functions of the State has always been administration of justice. Law was simply considered as a branch of 'Dharma'. Hindu Smritikars considered justice and reason as guides in legal matters:

केवल शास्त्रमात्रशृतियं न कर्तवयोही न इण्यः।
युक्तं हीने वचारे तृ धर्महानीः पृजयते॥ ख्रष्टः॥

(Decision should not be given by basing it on Shastras alone; there is failure of Dharma by a judgment devoid of reason.)

In the words of Manu

वेदः समूत्तः सदाचारः स्वस्य च प्रथिमात्मनः। एतत चतुर्वर्धिः प्राहुः साक्षात धर्मस्य लक्ष्मणम्॥

(The Vedas, Smritis, approved usages, and what is agreeable to one's soul (good conscience), the wise have declared to be the quadruple direct evidence of law.)

The concept of 'Dharma' in the Vedic Period can be seen as the concept of Legal Education in India.¹ Though there has not been any record of formal training in law; the dispensation of justice was to be done by the king on the basis of a self-acquired training.² It can be said that law in India has evolved from religious prescription to the current constitutional and legal system we have today, traversing through secular legal systems and the common law.³

During pre-independence era, Invasions by various rulers and dynasties distorted the concept of 'Dharma'. The Kings ceased to administer 'nyaya' and legal education got delinked from the objectives of justice administration. Before independence, the Indian legal profession and legal education had not developed a rationally functional approach to the problems of law and legal order and the Indian Legal Education inevitably tended to evolve in patterns that emphasized rote memory. To impart information—not critical understanding—remained the goal of legal education. After Independence, the rule of law was adopted as the most fundamental doctrine drawing commitment from the Preamble and Fundamental Duties enshrined in Part-IV of the Indian Constitution. To implement rule of law, there emerged need of skilled legal professionals. In 1961, the Advocates Act was enacted and the Bar Council of India (BCI) Rules were inducted under the same. These BCI rules govern the procedural aspects of Legal Education, For example, subjects to be taught, modus of examinations, eligibility criteria for institutions

¹B.T. Muragendra, "Need to Relook Legal Education in India", 50 (14) *University News*, 2012, at 5.

²Arthur T. Von Mehren, "Law and Legal Education in India: Some Observations", 78 *Harv. L. Rev.*, 1965, at 1180; See Swethaa Ballakrishnen, "Legal Education and Indian Returnees", 80(6) *Fordham Law Review*, 2012, at 2456.

³Available at: www.barcouncilofindia.org [accessed on February 18, 2013].

imparting legal education, degrees, etc. In 1998, the BCI amended and consolidated the rules and guidelines applicable till date and published the same.

Presently, the existing institutions imparting legal education in India follow both the patterns, i.e. 3 as well as 5 years law course (at graduation level). To supplement the lecture scheme of compulsory as well as optional papers prescribed in the curriculum, there are provisions of Moot Courts, Mock Trials, Court visits, Practical Training, Projects, Assignments, Research work, etc. Primarily aimed at producing trained professionals, the objectives of legal education are multipronged as well as multifarious. Few of these can be briefly mentioned as follows: to strengthen the rule of law and in turn, the democracy itself; to create awareness regarding juridical framework available in the country⁴; to bind the different fragments of society as a cementing force like blood flowing through various organs of the body; to promote accuracy of expressions, interpretations and argumentative skills; to help achieve socio-economic goals of the country in every possible field; to create a culture of tolerance, peace and equality above all; to promote the cause of human rights and human values; and to enable the country to develop a skilled manpower who can act as judges, educators, entrepreneurs and social jurists.

3 Role of Law Schools Imparting Legal Education: Current Scenario

The education as a subject finds a place in List III of the Seventh Schedule.⁵ Therefore, Union as well as the States has concurrent legislative powers on it. The legal profession along with few others has been prescribed under Entry 26 of list III. However, the Union is empowered to co-ordinate and determines standards in institution for higher education and/or research, scientific and technical institutions besides having exclusive power, *inter alia*, pertaining to educational institutions of national importance, professional, vocational or technical training and promotion of special studies or research.⁶

The 14th Report of the Law Commission in 1958 recognized the importance of balance between academic and vocational training. In 1949, the Bombay Legal Education Committee recommended that studying law as a science of law creates better lawyers and judges. The Advocates Act, 1961 may aptly be termed as the first legislation to bring uniformity in the prevailing standards of legal education. It provided for setting up of Bar Council of India (BCI) at national level and State Bar Councils in every state. BCI is the authority which has power to prescribe minimum academic standards for the institutions imparting legal education and regulate

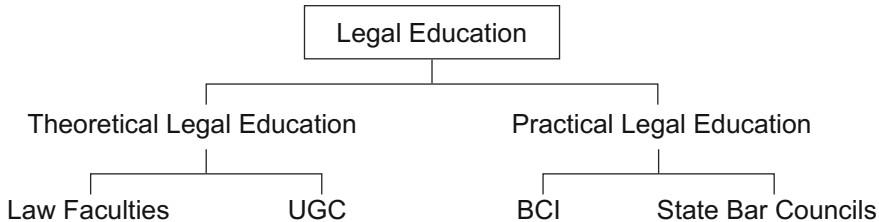
⁴Since ignorance of law is no excuse or everyone is presumed to know the law of the land.

⁵The Constitution of India, Concurrent List, Entry 25.

⁶B.T. Murgendra, *supra* note 1.

thereafter.⁷ The University Grants Commission (UGC), the higher education regulator, has also taken various steps to improve the quality of legal education by providing funding and other related measures to ensure the same.

Thus, control over legal education is diversified that can be presented as follows:



3.1 Challenges before Law Faculties/Schools

The Law schools/Universities are dedicated to a scientific system of legal education. In these dedicated institutions, a distinct legal pedagogy has been developed delineating from the traditional patterns. The law teaching is based on the doctrines gleaned from reported cases creating thereby, a theoretical basis for formal education. Somehow, there have been complaints from the various stakeholders in this profession regarding disconnection between the real or practical world of law practice and the unreal or theoretical world of law teaching. Various Committees on Legal Education from time to time have proposed following recommendations: to modify the law school curriculum to focus on the needs of citizens; to engage law students in public services while in law schools; to sensitize students to the broader social obligations of the legal profession⁸; to emphasize role of legal education in developing law as a hermeneutical profession; to equip lawyer to play diverse roles of a legislator, e.g. in drafting contracts, wills, memoranda of resolution outside courts, etc.⁹

In 2007, the Knowledge Commission¹⁰ recommended establishing a professional body to revamp the legal education in the lines of Medical and Engineering. Moreover, the National Law Schools also succeeded partially. They produced

⁷The Advocates Act, 1961, section 7(h).

⁸Justice V.R. Krishna Iyer and Justice P.N. Bhagwati in 1973, the Expert Committee on Legal Aid, Ministry of Law and Justice; Committee on National Juridic Peace: Equal Justice–Social Justice, 1977; available at: <http://www.legalserviceindia.com/articles/laid.htm> [accessed on February 18, 2013].

⁹Curriculum Development Committee (CDC) Report, available at: <http://www.barcouncilofindia.org/wp-content/uploads/2011/08/cdc-report-web.pdf> [accessed on February 21, 2013].

¹⁰Available at: www.knowledgecommission.gov.in/recommendations/legaleducation.asp [accessed on January 31, 2013].

competent lawyers for the corporate sector or LPO's but failed in their mission to produce socially relevant lawyers.

4 Regulator V/S Academia: The Ongoing Debate

How far the law schools in their 'hothouses' or academia in their 'ivory towers' are able to justify the responsibility has been a subject of debates, deliberations and discussions from numerous perspectives.¹¹ According to few, law schools somehow insulate from the market and its demands. The following are some of the prime issues that legal education in India faces: Dearth of talented faculty; Unsound physical infrastructure especially in the departments of traditional universities; Lack of academic freedom and autonomy within the campuses; Rare philanthropy initiatives; Poor academic standards due to above factors; Absence of professional advancement of academics; and Half-hearted execution of good governance measures.

4.1 Global Legal Education

Before the advent of globalization, the curriculum of law schools focused primarily on the Indian Legal System with a limited focus to the study of international and comparative law. Now, the need of the hour is a fair and balanced mix of exposure to both national as well as foreign legal systems. Moreover, with the development of web-based research and other online research tools and databases, there has been a remarkable transformation in the development of comparative and international law research. It is important for global law schools to have or provide access to legal material from jurisdiction all over the world.¹²

In 28th May's Circular, the BCI said in a statement that, 'Lawyers are well conversant with the problems and they are the best person to decide as to what is needed for the students pursuing legal education and the academics have a limited role to teach the books which are almost all authored either by noted lawyers or the judges'.¹³

80 Indian law teachers from 32 Indian and 3 foreign Universities, taking strong exception to its statement, addressed a petition to BCI urging the regulator to 'consult more meaningfully' with legal academics while framing policies related to

¹¹Larry E. Ribstein, "Practicing Theory: Legal Education for the 21st Century", 96 *IOWA Law Review*, 2011, at 1655.

¹²C. Rajkumar, "Global Legal Education in India: Opportunities and Challenges", *Halsbury's Law*, 2009, pp. 12–19.

¹³The statement of BCI to Parliamentary Standing Committee reviewing the Higher Education and Research Bill (HER), 2011, available at: www.legallyindia.com [accessed on February 18, 2013].

legal education. They also urged the BCI to withdraw its announcement regarding mandatory fee-based registration for all law teachers, students and law colleges for the purposes of an online database.¹⁴ As per the petition, lack of consultation has resulted in ‘alien’ and ‘excessively burdensome’ legal education norms, from the perspective of law schools.

In the opinion of the author, the legal education in India should be dominantly regulated by academicians since it is not easy to train young professionals without the support and co-operation of law teachers. It is quite easy to produce mere practicing lawyers but it is an uphill task to produce responsible legal professionals. In the words of Madhava Menon, ‘Legal Education in India should be liberated from the dominant control of the Bar Councils and entrusted to legal academics with freedom to innovate, experiment and compete globally’.¹⁵

4.2 New Pedagogic Techniques: Need of the Hour

The emergence of Information Technology and Biotechnology is a major development that earmarks globalization era. Time–space compression, integrated circuits and microchips revolution are other developments that have added to the already existing challenges. DNA technologies, digitalization of the world and widespread privatization are other recent developments that need solidarity among legal fraternity. The changing environment is creating markets for skills that are not adopted by the law schools.

In view of the above discussion, few of the suggestions are as follows:

- (i) A scientific knowledge of language is essential for law students since language is the life of law;
- (ii) Financial assistance for the poor students and researchers;
- (iii) To learn to reconcile normative law with implementation;
- (iv) Concentration on end point justice education will transform the beginning stage of policy making;
- (v) Legal needs of the rural area still remain unattended mostly;
- (vi) Centre of excellence should be developed and provided autonomy *vis-a-vis* academic decisions;
- (vii) More emphasis should be on innovation and research rather than mere transfer of knowledge;

¹⁴Professor Shamnad Basheer, NUJS Kolkata has drafted the petition; Professor Upendra Baxi, former Vice-Chancellor, Delhi University; and Professor M.P. Singh, former Vice-Chancellor, NUJS Kolkata are few of the signatories to the petition. The online version of the petition is signed by 250 law students and lawyers. available at: <http://www.legallyindia.com/201208223051/Law-schools/law-teachers-ask-bci-for-say-in-legal-ed-a-to-scrap-compulsory-web-portal-fees> [accessed on January 31, 2013].

¹⁵N.R. Madhava Menon, “Training in Legal Education: Some Comparative Insights from Indian and American Experience”, 49(3) *JLI*, at 400.

- (viii) Gender empowerment and sensitization of the whole system would be easier if routed through the channels of legal education;
- (ix) To meet new governance challenges faced by economy of the country in the wake of globalization, we need to tap the hidden talents of budding lawyer while in law schools. New pedagogic techniques can make the same simpler;
- (x) Law schools need to respond to the Information Technology challenges by training students to become 'Legal-information engineers';
- (xi) Experts in the fields of Securities and finance laws as per changing demands can be prepared only if the teachers are trained to train; and
- (xii) Availability of the best resources to the faculty should be ensured as incentives to attain these objectives.

The Advocate has to become socially more relevant and technically very sound if he has to survive and serve the needs of the society in the twenty-first Century.¹⁶

5 Conclusions

A paradigm shift in the legal education system is inevitable to face the upcoming challenges. There is a need to encourage philanthropic initiatives that may help the country to build educational institutions for future. To solve the problem of human rights and humanity itself, we need to pool the brilliant minds and look for positive solutions. Sincere efforts in this direction would surely bring desirable fruits.

The foreign model can be imitated where branded world-class institutions have managed to involve public-spirited private entrepreneurs and organizations to yield the best results. Infrastructure should be at par with the world-class institutions if our target is impact-oriented result and competitive excellence. To revive and rejuvenate legal education so as to enable it to cater to the needs of the twenty-first century, an agenda needs to be set with bonafide intentions and noble aims.

The false dichotomy of '*theory versus practice*' should be put to rest to face the real challenges. The following words of Sardar Valabhbhai Patel, The first Home Minister of India, hold relevance till date especially in the context of legal education:

We are at a momentous stage in the history of India. By common endeavour, we can take raise the country to greatness.

¹⁶Ranbir Singh, "Reforms in Legal Education and Legal Profession in India", *Andhra Law Times*, 1998, pp. 15–18.

Chapter 42

Issues and Challenges on Legal Education: A Study with Special Reference to Odisha

Prasant Kumar Swain and Shaikh Sahanwaz Islam

The foundation of every state is the education of its youth
—Diogenes Laertius

1 Introduction

Education is one of the most critical factors responsible for the development of human being. It emancipates the human beings and also liberates him from ignorance. It plays a vital role in shaping and molding the future of the country. The need of the legal education cannot be over emphasized; it is directly responsible for the effective realization of individual's right thus can affect the quality of civil life of the citizens in a State. Further, the knowledge of law is essential for every individual as ignorance of law is not excused in law. Legal education assumes great significance in a democratic country like India, where rule of law is the driving force of the Government. It has been realized that the legal education should be able to meet the ever-growing demands of the society and should be thoroughly equipped to cater to the complexities of different situations.

Twenty-first century is the Century of knowledge, in which the nation's success will be tested on its ability to convert knowledge into wealth. The last part of twentieth century had helped us to arrive at new economic, social, ecological and political arrangements all over the world. New horizons were opened in the field of trade, commerce, science and technology and law. Globalization has changed dynamism of entire polity and society. Now the whole world is giving importance to knowledge economy. Since the development of knowledge economy remains an important goal of all the developing countries, the establishment of educational institutions of global excellence along with changed new curriculum of global standard has become the priority of the developing country like India. The vision of

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legal education is to ensure justice-oriented legal education to contribute to the realization of values enshrined in the Constitution of India. The main challenge facing India's legal and judicial system is to ensure that common people in India are able to enjoy their constitutional and legislative rights to the fullest extent.

It has been accepted that today Indian legal education is struggling in comparison to its counterpart across the world. There has been a relentless effort at the national level to improve the condition of legal education. Many plans, policy and vision documents are made, but there is no sign of significant improvement in the condition of legal education at national level. The present chapter is an attempt to find out the gaps that affect the standards of legal education in the country, it focuses on the special case of Odisha and suggests remedies in this context.

2 Historical Development of Legal Education in India

The history of legal education in India dates back to the pre-independence period. In 1868 law classes were started by *Anjuman-i-Punjab* in the province of Punjab, which was later taken over by Punjab University in 1870. In 1873, Punjab University introduced rules for an entrance examination as a condition precedent for admission into law course. In 1885 Allahabad University was established and it introduced the legal studies, gradually many other universities also started legal education. During that period uniformity in a pattern of legal education was lacking. The main purpose of university legal education was, not to teach law as a science or as a branch of learning but merely to impart knowledge of certain principles and provisions of law. Thus, part-time institutions were regarded as sufficient for this purpose and the teachers were generally the practicing lawyers. During 1947–1960 many law colleges were opened, but those were not having adequate infrastructure and facilities.

A major development of legal education started after the enactment of Advocates Act in 1961. The Act established the Bar Council of India (BCI) and confers power to prescribe standards of legal education and recognize the Law degrees for enrollment as an advocate. Consequently, some uniformity and structural changes in legal education throughout the country was made. In 1967 BCI started law as a 3-year degree course like other degree courses. In 1980, the Ministry of Education, Government of India constituted a working group to examine the status of legal education in the country and to suggest measures for the improvement of the standard and quality of legal education. In 1983, the BCI introduced an integrated course in law, which led to the establishment of National law school at Bangalore in 1987. Thus, presently BCI is recognizing 3-year LL.B. course and 5-year integrated BA.LL.B course as a graduate degree in law and the holders are eligible for enrollment in bar.

Presently the legal education is regulated by various institutions BCI, University Grants Commission (UGC), Government policies, Affiliating University and Governing bodies (in case of private law colleges).

- i. BCI is formulating rules regarding intake of students, teacher-student ratio, curriculum, number of full-time teachers and infrastructure and other conditions to ensure that standard be maintained by the colleges.
- ii. The UGC is also providing norms for appointment of full-time teachers.

In order to maintain and raise the standard of legal education, the UGC in consultation with universities or other bodies concerned takes all such steps as it thinks fit for the promotion and coordination of university education and determination and maintenance of standard of teaching, examination and research activities in universities.
- iii. The State governments have their own rules for the opening of colleges, thus the law school/colleges have to obtain the concurrence of the concern Governments at the time of opening. Second, the State government is making the appointment of teachers in the government colleges and the university constituent colleges. Presently, there are three kinds of law colleges. Such as: (1) Constituent Law College/Government law colleges, (2) National law school, and (3) law colleges managed by private bodies. The State Governments are directly or indirectly funding the first category in terms of salary of the persons employed in the university and providing a bulk grant to the second category for their overall management, however nothing is paid to the third category in most of the cases.
- iv. The management of the private law colleges, either educational societies or other private bodies has to manage the entire financial burden of the tuition fees and other fees charged from the students. Therefore, they make their own rules and appointment procedures. Although they are bound by the BCI rules and standards but practically they are unable to meet these norms.
- v. The universities are responsible for the designing the course curriculum and conduct of examinations. Although BCI has provided the broad curriculum but the syllabus is to be prepared by the university concerned.

3 Issues and Challenges Concerning Legal Education

It has been accepted in all quarters that the quality of legal education is not satisfactory. Although the above institutions try to improve the standard of legal education by providing rules and conditions, the fact remains that uniformity in the standard of legal education in various states has not been achieved. Some grey areas and impediment to the standard of legal education have been explored by the certain bodies such as Law Commission and National Knowledge Commission.

3.1 The Report of the Ahmadi Committee, 1994

The Report of the Ahmadi Committee (1994) and the various resolutions in other conferences have repeatedly pointed out that the BCI has granted permission to a

large number of law schools which are maintaining very poor standards and have very poor infrastructure and several of these colleges are located in remote places, sometimes not even in the district head quarters. The faculty and library facilities in several of these law colleges are very much deficient.

Therefore, there is an urgent need to set up four Centers for Advanced Legal Studies and Research (CALSAR), one in each region. Such regional centers may be established using a base model with the mandate for promoting legal studies and research, and shall enjoy full autonomy. Some of the tasks to be assigned to these advanced legal centers would include cutting edge research on developing subjects and related areas, as well as to serve as a think-tank for advising the government in the national and international forum. Some of the specific functions and objectives of these centers would include the following: Bringing out a peer-reviewed journal of international quality; Encouraging interaction across disciplines to facilitate a multidisciplinary approach to understanding law; Institutionalizing arrangements for having national and international scholars in residence; Organizing workshops and conferences on contemporary developments and issues of law; Undertaking in-depth research projects on new and developing areas of law, including specializing in some branches of law.

3.2 Law Commission 184th Report, 2002

The Bar Council of India (BCI), under Section 7(1)(h) of the Advocates Act, 1961, is empowered to promote legal education and lay down ‘standards’ of such education in consultation with the Universities imparting such education. The University Grants Commission, under Section 2(f) of the University Grants Commission Act, 1956 is also having the power to exercise control over the Universities and affiliated colleges for prescribing standards of education. The BCI may prescribe standards of legal education in consultation with the universities. But in practice, it is not possible for the BCI to consult each and every University and there is no manner prescribed in the Advocates Act, 1961 for rendering effective consultation in this regard. Therefore, in its Report, the Commission has proposed that the University Grants Commission should constitute its ‘Legal Education Committee’ consisting of various specified faculty members.¹ The Law Commission has viewed that accreditation and quality assessment of law schools in the country must be introduced by the BCI and UGC, so that healthy competitive environment may be generated.² The provisions relating to recognition, de-recognition and inspection of Universities and law colleges need to be suitably

¹The Law Commission 184th Report, 2002.

²Ibid.

amended in order to do away with the conflicts in the exercise of powers by various bodies. The Commission has recommended³ that a law graduate shall get training from an Advocate having 10 years of experience in the Bar, and should also qualify Bar examination, before allowing him to be enrolled as an Advocate, as suggested by the Hon'ble Supreme Court in *V. Sudeer v. Bar Council of India.*⁴

3.3 *The National Knowledge Commission Working Group on Legal Education, 2007*

In order to improve the quality of legal education, certain minimum conditions for admission to law schools and universities need to be agreed upon. Some NLSUs have agreed to conduct a common entrance test (CET). Consideration may be given to including other law schools and universities in the CET network. A single common entrance test for both 3-year and 5-year LL.B. programs may be devised.

In order to realize the stated vision and goals of legal education, the curricula and syllabi need to be based on a wider body of social science knowledge. The syllabi of law courses have to be carefully designed. They must respect the multidisciplinary character of legal education. Legal education must equip the student with the necessary theoretical and practical skills to deal with the diverse and expanding world of legal practice. To impart these skills a combination of various teaching methods including lectures, the case-study method, and problem oriented exercises are required. An important aspect of curriculum development is the identification of appropriate reading materials, both essential and advanced. Study materials must include a range of readings including social science, science and technology, comparative and international, and human rights material. The task of curriculum development also includes the designing of appropriate frame work for evaluating students. The simple end-of-the year examination or end semester examination does not encourage necessary analytical, writing and communication skills.

The internship program is a critical element of professional legal education as it allows practical learning in real world settings from peers. The internship program that presently exists in many NLSUs needs to be extended to all other law schools, i.e. where it does not presently exist. Periodic workshops should be held to acquaint the law student with different aspects of mooting. Law schools must also establish formal procedures for selecting teams that represent the law schools in national and international moots.

Participation in legal aid programs should also be an integral part of legal education. It provides a crucial link between the esoteric world of law and the existential world of the ordinary citizen. The idea of holistic legal education would be somewhat incomplete unless a law student is acquainted with the problems of

³Ibid.

⁴1999 (3) SCC 176.

ordinary people. Suggestions of National Knowledge Commission in this regard may be relevant.⁵

Thus, it is clear that although a number of committee bodies have come out with many valuable suggestions for the improvement of legal education, the condition of legal education has not improve much mainly due to the presence of heterogeneous type of institutions imparting legal education, different policies adopted by apex bodies and cold response of the State to the suggestions given by the committees.

4 Position of Legal Education in Odisha

The condition of legal education in Odisha is not much different. Prior to 2006, legal education was imparted by two categories of colleges, i.e. Constituent law colleges of universities and private law colleges. There were 23 law colleges including 4 constituent law colleges in all the 3 universities of the State apart from some non recognized colleges. The intake capacity of all these colleges in 3-year LL.B. course was 6000 students per year out of which 1520 were in 4 constituent law colleges and the rest are taken by private colleges. Out of this, around 4309 students completed the law course.⁶ However, there were 100 students in self-financing integrated 5-year B.A.LL.B. (Hons.) course offered by 2 constituent colleges of Utkal University financing Course. The number of permanent faculties in the constituent law colleges was around 30 and in all the private law colleges was

⁵The National Knowledge Commission suggestion are as: (i) Providing continuing legal education for faculty members of law schools. All faculty members would be required to attend and clear minimum number of courses for promotion to professor grade; (ii) Courses/research subjects to include pedagogy, university management and administration, use of technology in legal education, etc.; (iii) Building a world-class library, with up to date and easily accessible resources, including online resources and a national network'; (iv) Establishing a network with other international law research institutions to exchange information and access resources worldwide; (v) Faculty exchange programs with leading universities abroad would help in enriching the knowledge base and familiarizing faculty members with other legal systems and innovative pedagogic methods; (vi) Young faculty members may be permitted to be associated with courts or law firms or corporate houses for brief periods of time in order to acquire practical knowledge. Appropriate infrastructure facilities to faculty, including the availability of computers, internet and access to online journals and legal databases may be considered; (vii) It is estimated that a law school needs a minimum annual budget of Rs. 5 crores to ensure that adequate number of faculty members, a proper administrative staff, infrastructure facilities including a well endowed library, computer facilities, quality teaching materials, conference facilities, guest houses, etc., are available; (viii) It is felt that it is the responsibility of the State for making adequate financial provisions. Unless the State finances legal education, it is difficult to ensure access to quality legal education at affordable costs. The alternative would be to evolve appropriate public private partnerships to finance legal education. Central and state ministries may also be urged to endow chairs on specialized branches of law. Such financing can be complemented with endowments from the private sector.

⁶Data collected from the affidavit filed by the State Government in the case of *State of Orissa v. Orissa Private Law Teachers Association, OJC5764/93, CLT*, May, 2009.

around 67.⁷ The total number of advocates enrolled in bar up to 31.12. 2006 was 38,272.⁸

In order to ensure the smooth management and reorganization of law colleges and keeping in view the need to develop standards of legal education, the State government constituted a committee⁹ in 1999 to report it within four months. The said committee recommended for reducing the affiliation of student strength to 160 from the session 2004 to 2005. Further, the committee recommended for inclusion of private law colleges into grants in aid fold on the basis of the decision of *M. P. Vasi* in Supreme Court on 2006.¹⁰ A case in this context was also filed in the Orissa High Court, in which the court had ordered to extend grants in aid to these colleges,¹¹ but the State has preferred SLP in the Supreme Court¹² in this matter and the matter is presently pending before the Supreme Court.

Presently in Odisha, legal education is conducted by 4 constituent law colleges and 19 private law colleges in 4 universities, one national law school and 2 deemed universities. Both 3-year LL.B. and integrated 5-year B.A.LL.B. (Hons.) courses are conducted. The intake capacity in 3-year course is reduced to 3000 from which the constituent law colleges are permitted to take 640 and private Law colleges are permitted to take rest of the students.¹³ The intake capacity in Utkal University is 180 (120 in constituent Law colleges and 60 in Capital Law College) in National Law School Cuttack it is 50 and it is around 350 in the two deemed universities. The permanent faculty position including principal is 17 in all the 4 constituent colleges and around 50 in all the 19 private law colleges. The National Law School and deemed universities have no consistencies in a number of permanent faculties. The number of advocates enrolled in State bar since 2006 are quoted year wise as: 2007–1523; 2008–864; 2009–1107; 2010–1597; 2011–1322 and 2012–1062. The total number of advocates enrolled in Orissa bar is 45,747 as on 31st December 2012.¹⁴ It is pertinent to mention here that so far the students from private integrated courses, i.e. from the National law school, deemed universities or private law college have not completed their course to join bar.

Further, it is noticed that the student–teacher ratio in the constituent law colleges is in a deplorable condition as it is more than 80:1 and likely to go high by the retirement of permanent faculties. The condition of private law colleges is poor on

⁷Data Collected from the membership register of “All Orissa Private Law Teachers Association”, the only registered association of Law Teachers in the State of Orissa.

⁸As per the records of Orissa State Bar Council.

⁹A high power committee was formed for *Smooth Management and Reorganization of Law Colleges in the State* Convened by Principal Secretary, Higher Education, Government of Orissa, under the Chairmanship of Justice L. Mahapatra, Judge Orissa High Court.

¹⁰The committee had made the resolution for the recommendation on 13.08.2006, records of All Orissa Private Law Teachers Association.

¹¹OJC5764/93 decided on 19.02.2009.

¹²*State of Orissa v. Orissa Private Law College Association* SLP 8799/2011.

¹³The position is after the recommendation of Justice L. Mahapatra Commission.

¹⁴Supra note 5.

all fronts most of them are not having adequate infrastructure like building, library, etc., and the student-teacher ratio is very poor. The majority of these colleges have not maintained the requirement of faculty as directed by Bar Council. The infrastructural facility in some of the private law colleges are slightly better, those which come under sections 2(f) and 12(b) of UGC Act and getting developmental assistance. With the above condition, many of these colleges cannot conduct regular classes which affect the examination system and ultimately the quality of legal education in the State. Further, it is noticed that the course curriculum and the examination system of the different universities are different.

Some of the reasons for the deteriorated condition of legal education in the State may be identified as:

- i. No uniform policy for opening of colleges, admission procedure and design of course curriculum in the State;
- ii. Insufficiency of faculties in the law colleges, Lack of faculty development programmes, and Lack of motivation for joining the teaching profession;
- iii. Lack of infrastructural facilities in colleges;
- iv. Lack of research opportunities in new areas;
- v. Lack of support for the law graduates for pursuing career in litigation.

4.1 Policies for Opening of New Colleges, Admission Etc

There is no comprehensive policy at State level for opening law colleges and for admission in law course. Presently, the BCI is controlling these areas. The BCI, under Section 7(1)(h) of the Advocates Act, 1961, is empowered to promote legal education and lay down ‘standards’ of such education in consultation with the Universities imparting such education. The University Grants Commission, under Section 2(f) of the University Grants Commission Act, 1956 (UGC Act) is also having the power to exercise control over the Universities and affiliated colleges for prescribing standards of education. In furtherance of these powers the BCI has set norms, as the college must have adequate infrastructure facility including library or deposit of 25 lakh rupees for the purchase of books for the library and at least 5 faculties and 1 principal for an affiliation of 80 intake capacity. It also has given a broad course curriculum which the concern universities can adopt with modification. It has a provision of inspection of the institutions to check the maintenance of standards by the counter parts for which the particular institution is to pay Rs. 150,000/- per year per stream. But from the factual position, it is observed that most of the colleges including the constituent colleges are not fulfilling the norms in the true sense. Regarding inspections by BCI, it also seems that proper inspections are not made by the organization as many colleges without adequate infrastructure, library and faculties are getting affiliation from BCI to continue the course.

4.2 Problems Regarding Faculties in the Law Colleges

The quality of legal education is directly related to the quality of teachers. Regarding faculty position in different colleges, it is revealed that almost all colleges suffer from the problem of an adequate number of faculty as prescribed by BCI. In constituent colleges, the appointments are to be made by the State Government as per the norms provide by UGC. Many faculty positions cannot be filled for long and the colleges are to be managed by guest faculties. Regarding the private colleges, the management is responsible for the appointment of faculties. As these colleges are not getting any financial assistance, these have to manage the whole affairs of the college from the contribution charged from students. Thus, very few teachers are appointed and that too at a very low salary.

4.3 Problems Regarding Research Opportunities and Infrastructural Facilities in Colleges

Globalization have been a subject of debates and discussions from numerous perspectives. There is no doubt that globalization has profound implications for the future of higher education worldwide. Globalisation of legal research has become a universal trend. Legal scholars working in a particular country or researching on the law and legal systems of that country do not limit their research to that country or its neighbours. Research can contribute significantly to the improvement of teaching. In Odisha, it is found that due to lack of infrastructural facilities the faculties are over burdened and cannot be spared by the authorities for research work. There is no opportunity for faculty exchange and student exchange due to the various reasons. Further, research work needs financial assistance, normally UGC is giving financial support to the faculties of the colleges covered under sections 2(f) and 12 (b) of the UGC Act but many private colleges are not covered by UGC and are not getting the support.

4.4 Problems of the Law Graduates

The students are the major stakeholders in the improvement of legal education. Presently there are two types of students admitted to the law courses, those who study in 5-year integrated law course who are very serious about making their career in law and normally come from good financial background and opt for corporate house for better package and the second category of students are those who study in 3-year course, who have opted for the course after completion of a bachelor's degree. They had taken their admission in law as they cannot be accommodated in the stream they had chosen earlier. There is no State patronage

for them towards creating any job opportunities except to join bar or judiciary by their own efforts. Thus, many good students are not opting law for their studies and career and therefore the quality of legal education suffers.

5 Conclusion

Legal Education is essentially a multidisciplinary education which can develop values needed to strengthen the legal system. The task of improving the quality of legal education entails a range of measures including reforms in the existing regulatory structure, significant focus on curriculum development keeping in mind contemporary demands for legal services, recruitment of competent and committed faculty, establishing research and training centers, necessary financial support from the State and creating necessary infrastructure, especially a well endowed library. Further, all the stakeholders like State, Society, Judiciary, BCI and UGC must act in a concerted manner for the betterment of legal education.

A holistic approach from BCI is required to standardize the Legal Education. It may be suggested that BCI should make a proper inspection of the institutions to eliminate the institutions not maintaining proper infrastructure. To bring quality students to the law course we should revive the entrance examination as a mandatory prerequisite for the admission into law. In case a common entrance for the country is not possible, the entrance should be conducted at State level through joint entrance test. The fee structure of Government colleges and private colleges should be determined uniformly in the country. It is also felt that the Bar Council should spend some amount from the amount received from the colleges towards the supply of journals, organization of moot courts, etc., in colleges for the benefit of the students.

In *Manubhai* case¹⁵ the Supreme Court had stated that the States have a duty to provide grants in aid to law colleges. But many States are still trying to avoid it. Thus, it is suggested that the States should make a comprehensive policy for legal studies and extend grants in aid to these colleges and appoint a sufficient number of faculties in the constituent colleges.

Faculties must update themselves with the new and innovative subjects. In this connection they must participate in orientation programmes, refresher courses, seminars, and symposium; write articles and engage themselves with other research activities apart from teaching in the class room.

The above may be done by a single regulatory body having an understanding of legal education and profession, thus, a need to form a legal education committee to explore the hindrance in the quality of legal education and suggest remedies in this context is strongly felt. A concerted effort by all stakeholders is desired.

¹⁵*State of Maharashtra v. Manubhai Pragaji Vashi* 1995 (5) SCC 730.

Chapter 43

Legal Education in India: Need for Reform

Arun Kumar Singh

1 Introduction

Education plays an important role in the process of social change. It is a very powerful medium of bringing changes in the society. The law influences almost every human activity in a civilized society. Sometimes it appears that law follows social change and sometimes it leads. When law follows social change it keeps itself updated so as to march with society and if it lags behind, it remains a statute book but ceases to be effective and will have no practical utility.¹ There are many areas where law leads society. Initially, these laws are not very effective, but gradually succeeded in moulding the taste of the society; like laws against Sati, Dowry and other welfare laws have shown their impact on society.² That is why value-based legal education is being given more importance in almost all the countries of the world. The importance and quality of Legal Education in a democracy like ours is bound to affect the quality of the judicial process, legal profession and administration of law at all levels. A well administered and socially relevant legal education is an essential instrument which plays a key role in the proper delivery of justice. It is the soul of society which is equally important to lead a meaningful life. Legal education involves not only the study of law but a study which also inculcates the ability to make use of law, to analyze it, and to criticize it as a member of the legal community. This chapter aims to discuss the issues regarding legal education, especially in India. It also tries to highlight various reports as well as the views of Judiciary.

¹G.P. Tripathi, *Law and Social Transformation* (Central Law Publication, Allahabad, 2012) at 1.

²Ibid.

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2 Historical Background of Legal Education in India

It is believed that the life on the earth is regulated by the laws of the Lord or the Divinity. It is ‘rule of law’, that draws the essential difference between human society and animal world. Law in India especially Hindu law emanated from *Vedas* and *Upanishads*. The legal education was basically transplanted by English rulers in India. The legal profession in India was first time recognized by Lord Cornwall in 1793. It came into existence in India in 1855 when the first professorship of law was established at the Government Elphinstone College in 1855.³ However, the formal legal education started in India in 1857 when the legal education was introduced as a subject in three Indian universities in Presidency towns of Calcutta, Madras and Bombay.⁴ In 1954 the XIV Report of the Law Commission of India which is also known as *Setalvad Commission* highlighted the need for reform in the legal education system. After independence, the Parliament enacted the Advocate Act in 1961 and gave autonomy to the Bar Council of India on Legal education. Beside it, other autonomous bodies like University Grant Commission, Ministry of Higher Education and Ministry of Law and Justice and Universities and Colleges are other segments of control over Legal education.⁵ Before introducing 3-years course in 1967, 2-year course was in existence. For entry to the Legal profession, the Bar Council was holding the examinations.⁶ The Central Government again framed the rules in 1979 called Advocate (Right to take up Teaching) Rules 1979. This rule allows the Advocates teaching of law while practicing provided it does not exceed 3 h a day.⁷ This encouraged the commercialization of Legal education. In 1976 UGC appointed a Joint Consultative Committee with Bar Council Education Committee which recommended the practice of admitting graduate to LL.B Course and also recommended a 4-year integrated LL.B degree course after 10 + 2 to be tried in few selected universities. The recommendations were sent to the Bar Council and also circulated to the universities. On 29th August 1980, the University Grants Commission agreed with the views of the Bar Council to introduce a 4-year LL.B integrated course after 10 + 2.⁸

Bar Council of India arranged a meeting of Legal Education committee with members of Law Panel of the University Grant Commission, On 17 April 1982. The Committee unanimously decided that Law course should be of 5-years after 10 + 2 and it will also include practical training as an essential part of professional

³Prakash Chandra Shukla, “Legal Education in India: Challenges and Prospect”, XXXII *J.T.R.I. Journal*, 2010, at 244.

⁴K.L. Sharma, *Sociology of Law and Legal Profession* (Rawat Publication, 1984) pp. 39–54.

⁵R.P. Upadhyaya, “The Myth and Reality of Legal Education in India”, 3 *International Journal of Jurisprudence and Philosophy of Law*, 2009, pp. 189–196.

⁶The Advocates Act, 1961, sections 28(2) and 24(i)(d).

⁷Supra note 3.

⁸Ibid.

education.⁹ In 1983, there was a conference of Vice-Chancellors of the University of U.P. opposing the implementation of 5-years Law Course. It was also criticized by the Maharashtra Bar Council and the then Chief Justice of India in 1983. However, on 1st November 1983, UGC issued a circular to the Universities for adopting 5-years integrated course after 10 + 2 in due course of time. But a pressure was created by Law Minister on Bar Council of India to drop 5-years Course. In such circumstances, the Bar Council of India adopted a decision to allow 5-year course and 3-year law course simultaneously.¹⁰ The main reason for the implementation of 5-years Law course was that most of the Law Colleges of the Country were handled by part time law teachers and the State or Central Government was also not ready to bear the extra burden. The idea of establishing National Law Schools as autonomous Universities was a genuine need for improving the quality of Legal Education. In this direction, the first National Law School of India University (NLSIU) was set up in 1985. Now almost all the states are having National Law Schools/Universities.

3 Issues Relating to Legal Education in India

Despite unprecedented growth in world incomes and unparalleled improvements in global standards of living over the past few years, the legal education has not achieved its objective in a satisfactory way. It is the legal education that plays an important role in promoting social justice. In the present globalized world, every aspect of human life is getting affected, legal education is no exception.

Infrastructure Problems

Physical infrastructure is very much essential for imparting proper education. Construction of class rooms, chambers for professors, building up an appropriate law library and other basic physical infrastructure such as moot court room, conference room are essential for an institution. But the reality is that most of the colleges lack building or libraries of their own. Some of the law colleges are running in two or three rooms. The consequence is that the students without the motivation of learning choose law as a resort. It is also surprising that the situation prevails despite regular inspection is done by the Bar Council of India.

Lack of Qualified Faculties

Quality teaching ensures the productive and beneficial result for the students. Lack of quality teachers as well as researchers is a major problem of legal education. The young talents do not prefer law teaching as a profession. The reason is either poor incentive or prolonged system of promotion from Assistant Professor to Associate Professor.

⁹Ibid.

¹⁰Ibid.

Crises of Financial Supports

The financial problem before the educational institutions is a matter of serious concern. Being a welfare state it is the duty of the state to provide proper financial support to the institutions. So far as Central Government funded institutions are concerned they are having proper financial resources. But for those institutions that are state funded or aided financial stability is a big problem. That is why the mushrooming of private institutions is taking place in the field of legal education with no intention to impart quality education.

Out-Dated Method of Teaching

The main purpose of university legal education seems hitherto to have been not the teaching of law as a science or as a branch of learning, but merely imparting to students a knowledge of certain principles and provisions of law to enable them to enter the legal professionals.¹¹ In India, generally, two methods of teaching are adopted the first is ‘theoretical method’ of teaching and the second is the ‘case study method’. The first method is applied in most of the universities and colleges. In this method, generally, the sections of the Acts or Code is discussed and more attention is paid to the analysis of cases. In the second method, the emphasis is given on the analysis of cases. In this system, the cases are edited by the faculties and these materials are circulated to the students and in the class room, these cases are discussed with the help of provisions. The second method is more effective. It can be made more effective by adopting new methods of teaching including technology such as PowerPoint presentations.

Lack of Social Responsibilities

The rich people can philanthropically do a great contribution in the field of legal education for its growth and development. Many reputed educational institutions of the world like Harvard University and Oxford University are financially supported by their alumnise. The same is felt for India also.

Casual role of Authorities

Legal education is under the regulation of three authorities the first is universities/colleges where the legal education is being imparted, the second is the Bar Council of India and the third is University Grants Commission (UGC). UGC is the funding as well as controlling authority whereas remaining two are the controlling authorities only. The BCI is changing syllabus regularly and sometimes without paying proper attention. This results in repeating of the syllabus. For illustration, the Public Health Law and Law and Medicine are two different papers but syllabus is almost the same. Similarly, the syllabus of Women and Law and Gender Justice are same. BCI is empowered to promote legal education and lay down ‘standards’ of such education in consultation with the Universities imparting such education.¹² Similarly, UGC is also having the power to exercise control over

¹¹S.K. Verma, “Legal Education, Research and Social Change”, S.P. Verma (ed.) *Indian Judicial System: Need and Directions of Reforms* (IIPA, New Delhi, 2004) pp. 321–331, at 322.

¹²Supra note 6, section 7(1)(h).

the Universities and affiliated colleges for prescribing standards of education.¹³ But practically it is not possible for the BCI to consult each and every University and colleges. Therefore, the Law Commission of India in its 184th Report has proposed that the University Grants Commission should constitute its ‘Legal Education Committee’ consisting of various specified faculty members.¹⁴ The Commission has recommended that the UGC Act, 1956 be amended by providing a separate provision for constituting the ‘Legal Education Committee’ of the UGC.¹⁵ It has also recommended that the UGC shall nominate three members out of its Legal Education Committee, for the purpose of the ‘Legal Education Committee of the BCI’.¹⁶ It has proposed that the Legal Education Committee of the BCI should also have one retired Judge of the Supreme Court and one retired Chief Justice or retired Judge of a High Court to be nominated by the Chief Justice of India.¹⁷ Accordingly, it has recommended amending section 10(2) of the Advocates Act, 1961.¹⁸ The Legal Education Committee of the BCI should consult the Legal Education Committee of the UGC. It will have to fulfil the requirements of specified consultation process. The procedure for consultation is provided in the proposed section 10AA of the Advocates Act, 1961. Further, it is also recommended to elaborate the expression ‘standards of legal education’ in the Act by amendment of section 7 (1) (h) of the Advocates Act.¹⁹

4 Comparisons Between National Law School and the Traditional Universities

The objectives behind the establishment of the National Law Schools/Universities were to bring about perceptive changes in the quality of Legal Education in India to make it at par with the world standards. Many National Law Schools/Universities are running in India. This is a welcome step but there is an apprehension for generality and compromise of quality. The first thing is the cost of quality education which is constantly on the rise. The high fee structure in National Law Schools is not affordable for everyone. The second point of concern is that the students of National Law Schools are generally from the sound financial background and their objective after completing the course is not to work in Indian System. Either they

¹³The University Grants Commission Act, 1956, section 2(f).

¹⁴Law Commission of India 184th Report on “The Legal Education and Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956”, 2002, at 3.

¹⁵Ibid.

¹⁶Ibid.

¹⁷Ibid.

¹⁸Ibid.

¹⁹Ibid.

want to work in multinational corporate sectors or attach with some law firms. They rarely opt for services like Judicial Magistrate or other legal officers. This differentiates them from the students of traditional universities or 3-year degree courses. It is important to note that lack of teachers in National Law Schools creates problems for the students to get proper knowledge of the core subjects. The excessive work load on teachers as well as students does not provide them time to study, do research and analyze the law. Undoubtedly these schools have the infrastructure, however, the quality of students in terms of subjective knowledge is not very encouraging. Hence, need has arisen to reformulate the conceptual intricacies existing in law schools to ensure individual sustainability and collective progress by adopting co-ordinate approach. There is also a need for exchange programmes of the students and faculties. To produce quality lawyers, judges and scholars it is essential to make them aware of the science of law. A thorough grounding in the principles of law is absolutely necessary for the make-up of a real law scholar. It is important to note that the two systems of 5-year and 3-year law do not stand to compete with each other. As long as the problems associated with 5-year law are not removed, both the systems must co-exist and the society must benefit from their coexistence.

5 Conclusion

From the foregoing discussion, it appears that legal education in India is in its transition phase. The Legal education can play a very crucial role for society by imparting relevant legal knowledge to student and making them good law abiding citizens. It is possible when ‘each one reaches one’ formula is adopted. India is the country with huge population and everyone cannot afford a costly education from National Law Schools. So far as quality education is concerned five norms are an essential-quality syllabus, quality teaching and evaluation, quality research, quality faculty, and quality character.

Chapter 44

Donut Style of Teaching Law, the Multidisciplinary Subject

Rimali Batra

1 Introduction

I asked my students to draw a tree, they did and with ease. Then, I asked my students to draw a right or a duty or law. With some struggle, they gathered their imagination and then drew pictures of a court, a lawyer's gown, a judge's wig and gavel and all these pictures needed the aid of their own interpretation to explain to others—why they thought their picture depicted a right or a duty or the law. The lecture concluded with stating Law is not an art and Law is not a science as well. Law is Law.

The debates on defining the nature of the subject evolved the argument of Law being multi-disciplinary. Even before the argument of law being multi-disciplinary was inked, scholars and academicians readily nodded to the argument. Academicians who would have attempted to limit the discipline of law to law have run into circular arguments about the ‘nature of the subject’. The chapter is not going to discuss or debate either the nature of the subject nor confirm or refute of it being inter-disciplinary, just solely disciplinary or being multidisciplinary. It will do neither of these. The chapter is set up on the premise that law is multi-disciplinary. If someone was to debate and then conclude with certainty, it is not, I would have to alter my ideas and thesis to suit the definition and nature of law. The chapter discusses a problem that Law Teachers face while imparting knowledge of a multidisciplinary subject when they themselves have studied only one discipline—Law.

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2 Setting the Ground

Here, it is important to elaborate a little more on the premise of the chapter. It presumes law is multidisciplinary like stated above. The focus is on teaching law undergraduates in law schools in India. The problem is identified as '*to teach or not to teach*' the multidisciplinary aspects of the law. The same may be elaborated with the help of examples:

- i. Mr. X is a Corporate Law professor. He has started teaching Corporate Laws to fourth-year law students in Abc NLU, India. While he is conducting a lecture on Share and Share Prices under the Companies Act—a student asks him a question—‘*What can I suggest to my clients who would want to move the share price upward? How can he do that legally? Who moves the price?*’ There is a pause period.
- ii. Ms. D is a Property Law Professor in the same law school and teaches Transfer of Property. During her class on Mortgages, she is asked the following questions—“*Can I mortgage my eyes, if I can donate them? Are eyes my property? If they are, whether they are moveable or immoveable and what about the constitutional right of property*”. There is a pause period.

These examples may be limited but do bring out a critical problem in teaching a subject like a law which is multidisciplinary (touches base with other disciplines) and inter-disciplinary (touches base with other laws).

The problem arises primarily because of the following reasons:

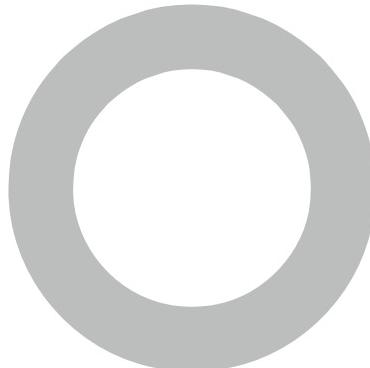
(a) *Law is Multi-Disciplinary, but is the Course Content?*

The teachers have to stick to a certain time and syllabus of teaching after all, teaching can't go on forever and be about everything. The problem is with the syllabus and its closed quarters. The syllabus was written or proposed with the intent to teach law as a subject of doctrines, sections, policies and judgments. It did not start with being multidisciplinary. It could not have been. A lot of the multi-disciplinary argument has to do with the introduction of the 5-year law course in India where a BBA or a BA or BSL was merged with LL.B. There is no straight jacket Mathematics on how two degrees, each 3 years long can be merged, but nevertheless they are less questionable for reasons of being comprehensive, shorter-in-duration and definitely a success. The subjects that compromised a year off were like the women of the India community who normatively have to leave their parental houses for the sake of staying with in-laws. They can always choose not to marry and be an independent entity, just like the subject of BBA or BA. Nonetheless, if they choose to marry—it is with some compromises. Is the compromise working well for ‘law’ as a subject? Let us explore this thought for a while. Can we merge two professional courses like CA/CS and Law? or Medicine and Law?—*prima facie*, no. The reason is clear—they are professional courses, regulated by professional bodies and demand a certain amount of ethics and morality which may conflict with other professional subjects. I am not out-ruling the

possibility of it, not happening. The possibility of it being practiced together is absurd and not appropriate. Let us consider another question, why is Human Rights or Social Activists degrees merged with Law. It would do wonders if the social worker could be trained as lawyers. There is a need and a missing medium. A study of the syllabus of various Business School's in India suggests that 'Law' is a very (very) small part of Business whereas the story is different in a Law School, where to be able to understand law, some idea about business (or at least a bent of mind) is crucial. At the same time, it is vital to understand as to how society and politics view business and what is the role and responsibility of a lawyer. To offer a solution to this issue of course content not being multidisciplinary, I suggest the macro level of donut style of teaching.

(b) ***Law Teachers Are Not Jack of All Trades, Sometimes They Are Masters of One***

The statement can be expanded by comparing or drawing an analogy of law professors being actors. Just like actors know the core skills of acting (as a profession and as a degree) and gradually choose their forte as being a romantic actor or an evil villain, a law school teacher (trained and qualified as a teacher and a lawyer) has to assume various roles while teaching law, that is bring in the ideas from sociology, political science, medicine, business, art, culture, society and many more. If the teachers/professor is not apt at adapting role, they will see themselves running into the problem of, '*if the only tool you have is the hammer, all the problems are a nail*'. Hence, it is not only analogical but important to assume roles for advanced and visionary learning/teaching of the law. Are we expecting too much from law professors? The question has no certain answer in degrees or educations that law professors should be given, but the answer may be found in the treatment of the subject with the Macro-Donut Approach (stated below). It is only fair to state that professors are not a jack of all subjects. They may use the micro-donut approach for classroom teaching.



2.1 Law Taught in Donut Style

Most academicians, if not all, would agree with the statement that ‘reality is not an anti-thesis in law school teachings’ and merely saying that the profession cannot be taught but practiced after a student has written several exams is neither fair nor sufficient. Why? Let me explain this by comparing law with another professional degree, MBBS. The pioneer institution imparting the degree of MBBS, also harbors a research and development department; a surgical unit; an emergency unit; a pharmacy unit and to top it all—knowledge is imparted by practicing doctors. I am referring to AIIMS. Though it would be absolutely wrong to ask for a clinical law school like AIIMS for various obvious differences, but what cannot be rejected is the idea that professional space is created and professional guidance is given for reading the subject that will be practiced all life-long. Expecting the students to take on to practical training after they have gone through 5 years of identifying problems without a solution is like asking ‘*if you are thirsty and not offering a glass of water*’. Therefore, the donut style of teaching law is suggested to overcome the above-stated two challenges. Donut style is depicted in the form of a picture that looks as below:

The blue circle represents the other disciplines (law or non-law) which law interacts with. The inner white space represents Law. The donut style of teaching and learning works at both, the *microscopic* level and *macroscopic* level. May be called the *Zoom in* and *Zoom out* levels. These are explained below.

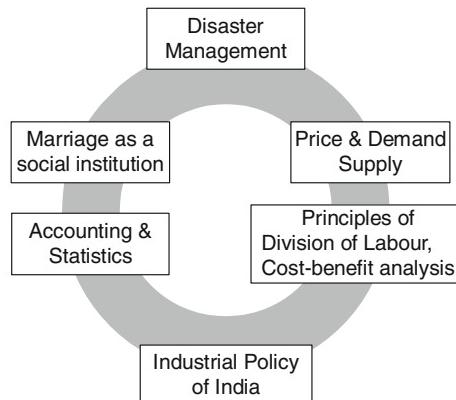
Before these styles are explored, let me address the question: Why choose the donut style? I was once in my law school told something about the nature of law, which I held on to close. It stated, simply put, that if there is an argument, there will be a counter argument. Let us park the idea of qualifying these arguments as ‘right or wrong’ because if these two arguments are like two leaking buckets—you will need another argument to counter them or combine them. Let us just understand this by saying that, Law on the statue book does not provide for individual cases. Law provides ‘*a default situation*’, ‘*a fallback option*’ and develops in the organic space of arguments and counter- arguments. It wouldn’t, therefore, be incorrect to say that a circle (representing law) is better suited than a four-corner square or a three-corner triangle. Where-ever you choose to enter the circle from will be case-dependent. You may hold on to an argument today for a particular case and may be refuting it tomorrow for another. Hence, it is circular, in more senses than one.

To represent other disciplines (law and/or non-law that constantly interact with Law) I drew another concentric circle around Law. It cannot be rebutted with extreme certainty that though these other subjects play a vital role in defining and understanding the law (like another added concentric circle) but they cannot to a certain extent seep deep into the core idea of ‘Law’—a case based subject. The following two sections will illustrate how the Donut Style gets camouflaged and adopted at classroom level (Micro and/or Zoom in) and at the syllabus setting level (Marco and/or Zoom out).

(a) *Donut Style At Microscopic Level*

Microscopic level or the *Zoom in* level refers to classroom teaching. Where a law professor, as defined before, is an actor, the professor will need knowledge of various subjects in his/her armory. The approach a law professor may follow is as explained below: For all sections, doctrine, judgments that are discussed, read or taught—there should be a three-layer process of breaking it down. First, there should be an identification of sections within law source that is multidisciplinary, followed by defining the extent of interaction and the scope of separating these concepts and finally classifying certain concepts as basics of understanding the law and teaching them with a different aid or source or method. It may be seen as a case based study of the law, which by far is the best way forward. This form or method helps to understand the limits of a teacher's role in the classroom and to depend on the method adopted; it may become 'a clinical approach' to teaching law.

(b) *Donut Style At Macroscopic Level*



A lot can be countered by adopting the Donut Approach to writing our syllabus that is taught at the law schools. This may be nothing new but is an approach that is best suited for a subject like law for multifold reasons. Primarily, the approach crystallizes the interface of law with other subjects. The key to the above diagram changes a little for this level. The outer blue circle represents the teaching of concepts that are inherent in the other subject than Law, like pointed out in the diagram on the left, whereas the core represents the 'law' embodying these principles.

It is obvious and not expected of the law syllabus to entertain all those plethoras of principles and therefore the donut approach helps. The course content should be moderated in two sections, one section explaining those concepts that the students need to know and the second part stating specific law related issues embodied in our bare texts. It is not of dire importance that these be categorized in a certain priority till the time the distinction is clear. Let us consider an example that will explain the

functioning of such a method. The following is an example of three subjects that can be taught this way very effectively.

<i>1. Corporate Laws</i>	
PART—I	Part—II
• Accounting Principles	• Director's Rights
• Balance Sheet	• Corporate Governance
• Principles of Economics	• Share and Share Capital
<i>2. Evidence Law (Codified)</i>	
Part—I	Part—II
• Forensics	• Evidence Act
• Arms and Ammunitions	
• Registration of Documents	
<i>3. Medical Law (Uncodified)</i>	
Part—I	Part—II
• Body Autonomy	• Various Act governing—Organ
• Law of Consent	• Transplant, Births and Death
• Law of Confidentiality	• Abortion, Medical Negligence, etc.
• Law of Privacy	

Therefore, such a classification would help in approaching the problem of teaching, a multidisciplinary subject, effectively and in a crystalized manner.

3 Conclusion

There are no conclusions, but there are certainly some questions and suggestions. The foremost idea is to inculcate a thought process among students of law that they have a wider interface (may be the widest) with the society and therefore learning the law in statue books is a very narrow view of the subject. A learning of this sort should be imparted in the first year itself. Secondly, there is a need to educate the students that law is law and the challenge is to neither tell them where it is found, who uses it, who writes it or who studies it; the challenge is to help 'you'—'the professional' understand what you can do with this powerful subject. In doing so, an inter-disciplinary syllabus and a multidisciplinary approach will do wonders. The chapter has suggested one way to make learning of law multi-disciplinary(ly)/inter-disciplinary(ly) appropriate the Donut Style which suggests that there is a need to re-visit what we teach (macro level) and how we teach (micro level) and to reform it. Law is a beautiful subject and profession and the aim of our teaching should be to ensure that the subject and the profession does not lose its aesthetics in the tug of war between making it more theoretical versus more multidisciplinary(ly) clinical. In the end, let's remember, changing our outlook to teaching this beautiful subject is not as hard as putting a crying baby to sleep.

Chapter 45

Legal Education in India: A Contemporary Discourse

S. Sivakumar

1 Legal Education in India: A Historical Backdrop

The modern legal education which is prevalent and imparted in the contemporary India has been transplanted by the Britishers. In fact, the seeds of modern education contrast to the traditional education system of Gurukulas, etc., were sown by Britishers with the establishment of three Universities in India. These three universities started imparting a formal teaching in Law since inception, which marked the beginning of an era. During the British period, the legal profession was a privilege of few and society was plagued with a series of socio-economic problem due to exploitation and absence of welfare state. Legal education was introduced in its very rudimentary form with hardly any standards and qualifications prescribed for admission to the law courses.

The concept of “Dharma” is not alien to the Indian legal system and the same very word is also found in the emblem of Supreme Court of India. The legal education which is the foundation of dispensing justice or Dharma has been prevalent in India since time immemorial. However, there is hardly any reference about the training and formal legal education to the kings and the judges of that historical era.

The role played by “Lawyers” in the freedom struggle and their leadership ability in the first half of the twentieth century—provided a solid embedment to the legal profession and legal education in the country. However, obtaining a law degree or formal legal education remained a privilege of few. It is important to note that in pre-independence era, the number of colleges, universities imparting formal legal education remained scant and the artificial scarcity kept the unfolding opportunities intact.

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January 26, 1950 marked a new beginning in the governance of the country whereby the Rule of Law became the hallmark of governance and the Nation State embarked on a new journey with cherished ideals and vision enshrined in the Constitution of India. Since we adopted a democratic form of government, it became necessary that judicial system of the country should be brought in tune with social, economic, and political needs of the society. With the changing complex of law and social needs, a greater need for change and reform in the structure and pattern of legal education was strongly felt. The ethos and content of legal education was required to undergo a change to fit in with the constitutional philosophy of ushering a new socioeconomic revolution. Gradually, the beginning of law courses in various universities and colleges of India expanded the outreach of the law to the different corners of the country.

Globalization has been a subject of debates and discussions from numerous perspectives.¹ It has come to stay and it has been embraced by the instrumentalities of society, market which function globally as well as locally. The experience of two decades of globalization has unfolded new opportunities in every segment of the socio-economic life. Similarly, it has also brought opportunities in the legal sector which includes legal education, legal profession, and trade-related aspects surrounding legal services. However, still, India has to walk miles before it integrates itself completely with the global legal market. The opportunities brought in by globalization in terms of volume of economic activities have certainly made the legal profession a leading career option. A pertinent question in this context is whether we are producing lawyers who are competitive enough to understand/face the challenges posed by globalization and contemporary business environment?²

India has a huge challenge to confront in promoting legal and judicial reforms, with a view to establishing a rule-of-law society. The role of lawyers and judges will become critical for addressing future challenges of governance. In this regard, the training that is imparted to future lawyers and judges in our law schools needs to be thoroughly re-examined to suit the social and economic transformation that is underway in the country. The national knowledge commission has been making a number of important recommendations that deserve attention³ and there is still a lot of ground to be covered in terms of actual work that is being done.

¹Swethaa Ballakrishnen and Homeward Bound, "What does a Global Education Offer Indian Returnees?", 80 *Fordham Law Review*, 2012, at 2441.

²A number of articles have been written on the importance of bringing reforms in legal education to make it more socially relevant and the various ways in which it can be done. See e.g., Frank S. Bloch and M.R.K. Prasad, "Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross National Currents from India and the United States", 13 *Clinical Law Review*, 2006, at 165.

³National Knowledge Commission Government of India, Report to the Nation 80–81, available at: <http://www.knowledgecommission.gov.in/downloads/report2009/eng/report09.pdf>.

2 State of Legal Education in Post-Independence Era

Just after independence, the declining standards of legal education and the decline in the prestige and image of the legal profession became a cause of concern. This was in contrast with the role played by the great leaders like Mahatma Gandhi, Jawaharlal Nehru, Subhash Chandra Bose etc., who all happen to be lawyers. Noting the state of affair our first vice-president Dr. Radhakrishnan noted that “our colleges of law do not hold a place of high esteem either at home or abroad, nor has law become an area of profound scholarship and enlightened research.” Subsequently, the Law Commission of India in its report (14th Report) on “*Reform of Judicial Administration*”, in 1958 opined as follows:

In the period of about ten years which has elapsed since the publication of the Radhakrishnan Commission, the position in regard to legal education in this country has, it appears, definitely deteriorated.

It also observed as:

The portals of our law-teaching institutions – manned by part-time teachers – open even wider and are accessible to any graduate of mediocre ability and indifferent merits. It is not surprising that in this chaotic state of affairs in a number of these institutions there is hardly a pretence at teaching ... This character is followed by law examinations held by the universities many of which are mere tests of memory and poor ones at that, which the students manage to pass by cramming short summaries published by enterprising publishers. The result, plethora of LL.B. half-baked lawyers, who do not know even the elements of law and who are let loose upon society as drones and parasites in different parts of the country.

The enactment of University Grants Commission Act, 1956 to streamline the process of higher education in all the fields brought a new hope and infused a new energy. This piece of central legislation has been enacted in pursuance of legislative power under entry 66 of List I of the VII Schedule of the Constitution. The Act made provisions for the coordination and determination of standards in universities and grants affiliation to the law colleges. The Act mandates the UGC as a regulatory body to lay down the standards and threshold for the promotion and coordination of university education and for the determination and maintenance of *standards* of teaching, examination, and research in the universities.

3 Legal Education in Present Scenario

Education institutions have an influencing role to play in all societal activities. Education is central to addressing the paradoxes and inequities that challenge our society today. “Legal Education is essentially a multi-disciplined, multi-purpose education which can develop the human resources and idealism needed to strengthen the legal system A lawyer, a product of such education would be able to contribute to national development and social change in a much more

constructive manner.⁴” According to one view, the new generation of lawyers is more proficient than their predecessors.⁵ However, the view needs to be examined properly.

The legal education reform is a widely discussed matter in India for the last few decades. Majority of these discussions were limited to under graduate legal education. Within the larger debate relating to reform of the higher education in India, there is an urgent need to examine legal education and the likely impact of globalization on it.⁶ In India, the law imparting institutions may be classified as follows:

- (a) The traditional law colleges offering LL.B. and LL.M. courses, including government and private law colleges. Private colleges may be aided colleges or unaided colleges.
- (b) Department of law in the university offering LL.B. course along with the postgraduate course in law (LL.M).
- (c) Exclusive law university called National Law School which offers LL.B. course.
- (d) Private universities and deemed universities providing law courses.

3.1 Advocates Act 1961 and BCI Rules

Under the Advocates Act, 1961, one of the functions of the Bar Council of India is to promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the Bar Councils of the States. Section 49(d) of the Act, enables the Bar Council of India to frame rules in regard to the standards of legal education to be observed by the universities in India and inspection of universities for the purpose. The Bar Council of India enacted its Rules in 1965 to deal with the standards of legal education and recognition of degrees in law for enrolment as advocates. Rule 21 of the said rules provides that the Bar Council of India may issue directions from time to time for the maintenance of standards of legal education and the university/college is required to follow the same. Schedule I to the Rules enumerates as many as 21 directions which the Bar Council of India is authorized to give to the universities/colleges.

Rule 8 of Chapter III of the Bar Council Rules dealing with the Legal Education Committee enables the Committee to make its recommendations to the Council for

⁴S.P. Sathe, “Access to Legal Education and the Legal Profession in India”, in R. Dhavan, N. Kibble and W. Twinner (ed.), *Access to Legal Education and Legal Profession* (1989), at 165.

⁵Gene Koo, “New Skills, New Learning Legal Education and Promise of Technology”, The Berkman Center for Internet and Society at Harvard School, Research Publication No. 4, 2007, at 9 available at: http://papers.ssrn.com/abstract_id=XXXXXX.

⁶John Varghese, “Global Legal Education and India: A Blueprint for Raising Indian Legal Education to Global Standards”, 2010, available at: http://papers.ssrn.com/sol3/paper.cfm?abstract_id=1728451.

laying down the *standards of legal education* for the universities; to visit and *inspect* universities and report to the Council; and to recommend to the Council for *recognition* of any degree in law of any university under Section 24(1)(c)(iii) of the Act. The Committee is also authorized to recommend the *discontinuance of any recognition* already granted by the Council. Rule 17 states that no college shall impart legal education unless its *affiliation* to any university has been approved by the Bar Council of India. Rule 18 deals with *inspection* by a Committee to be appointed for this purpose.

3.2 *Experience with National Law School (Five Years B.A. LL.B Integrated Course)*

The experiment started nearly a quarter century ago when for the first time National Law School of India University was established in 1987 in Bangalore. The establishment of first National Law School translated the much awaited reform in legal education into action. The niche course—curriculum designed to be taught over a period of 5 years, the availability of wide exposure and training exercise together with the various kinds of internships, externships, research assistant, etc., which a student has to go through certainly produced better law graduates. Guided by the philosophy of “Catch them young”—the national law schools seize the opportunity of moulding a young mind. Currently, there are 14 National Law Schools in various states of India. One of the remarkable developments of last decade is the growth of various private law schools and also the adoption of 5-year B.A. L.L.B. course by traditional law schools. The two regulatory authorities namely UGC and BCI have prescribed standards as a minimum benchmark for the private and autonomous institutes/universities. However, there have been reports of flagrant violation of statutory rules and guidelines not only by private colleges but also by autonomous institutes receiving grants from governments including National Law Schools.

One of the key areas where the violations occur is in the recruitment of faculties and teachers. We come across the designations like Assistant Lecturer, Research Associate, and Lecturer (without UGC-NET) in these law schools. It is surprising to note that the individuals holding such posts conduct classes regularly. This disturbing trend (of recent origin) has certainly caused impact on the quality of lawyers which are being churned out in thousands every year from these institutes including National Law Schools. It is again shocking to observe that these designations at NLUs are not only underpaid but they are also not being engaged in the activities for which they are recruited, i.e., research. It is very unfortunate that the people at the helm of the affairs are not able to motivate students to join legal academics. It is also a recent phenomenon worthy of noting that the law institutes including National Law Schools are recruiting candidates having LL.M. degree from abroad, although the legal and statutory requirements insist on requisite qualification of LL.M. along with

UGC-NET. This certainly undermines the talent of candidates who could not obtain a degree from foreign law school because of financial and economic constraint. The glam of having a faculty member with foreign Masters degree has certainly deciphered a pre-conceived prejudice in recruitment and selection process which also violates the minimum requirement of UGC and BCI. It is also important to note that the problem gets further aggravated because of lack of quality teachers who are equipped with the practical knowledge of law, so as to be able to impart quality legal knowledge and skills to his students.⁷

3.3 *Quality of Research*

One of the key areas where the law schools must put energy is the “quality of research”. Law is a dynamic discipline and it is necessary that laws and their interpretation change with time and confront the challenges posed by social, economic, and political transformation of the country. Thus, the role of law schools is paramount in forging these changing understandings.⁸ Most of law colleges including National Law Schools across India are engaged in providing profitable under-graduate and diploma courses and are putting less effort on quality of research. Certain National Law Schools offer M. Phil and Ph.D. programs—but it is felt that the research of these law schools are unlikely to be utilized because of plagiarism and other quality related issues. These days it is common to find a large number of publication in any *curriculum viate*—but it is indeed a sordid state of affair that most of these research are nothing but mere collection of observations from the decisions rendered by Supreme Court, texts of concerned domestic legislations, text of international conventions or treaties and some paragraphs lifted from some books or work of some serious researchers. The researchers (including faculty members) are engaged actively in producing these kinds of work because of the change brought in system. The performance of a teacher is evaluated not on the basis of the quality of research but on the basis of the number of so called research. As these researches are in the form of articles, research papers lack a critical evaluation, insights—there is need to revamp the present approach and serious deliberations are required by the members of legal profession, Bar and Bench. The law schools in India should engage in the task of conducting and supporting various research projects. The law schools should adopt an interdisciplinary approach to law, bringing thematic, empirical, and applied research to the key issues concerning

⁷Brent E. Newton, “Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in The Legal Academy”, 62 *South Carolina Law Review*, at 147.

⁸Elizabeth Chambliss, “Two Questions for Law Schools about the Future Boundaries of the Legal Profession”, 36 *Journal of Legal Profession*, 2012, at 329.

law and justice.⁹ It is important to note that instead of going through the original texts many law students delve into the process of googling things over the net. They rely heavily on the research work done earlier. While this is not a wrong thing to do if due credits are accorded to the original researcher it cannot be extended to the point of just amalgamating the earlier research findings only. Many a times, students do not even bother to check the accuracy of the information received.¹⁰

3.4 Teaching

(a) Case Law Methods—as a mode of teaching

The significant change emerging with the introduction of integrated course curriculum in law schools and law colleges is that these law schools experimented with the case law teaching methods. This is helpful and perhaps contributed significantly in churning out better law graduates. However, this trend has been on a decline because of lack of quality and serious law teachers. It is also important to note here that this method of teaching was successful because of the significant hard work done by the law teachers. As the teachers themselves were well read, the students could not escape from the reading of case laws. Given the challenges of privatization, academic freedom should be emphasized as a core component of ensuring higher academic standards and developing a curriculum which will meet the needs of future.¹¹ However, in recent years—this mode of teaching is declining because of non-serious law teachers.

(b) Comparative Law Method—as a mode of teaching

As noted above, globalization has brought challenges as well as enormous opportunities. The globalization of legal cultures, legal norms, and judicial process is not new. The judicial process of one jurisdiction is getting integrated with the world more significantly than ever. The citing of foreign case laws and formulating the proposition of law based on the legal practices and laws of different jurisdictions in a similar situation—has been a practice of much significance. Many a times lawyers, in order to buttress their arguments and discern the global trend, cite foreign cases which are of much help. It is not only the legal profession which needs to read and understand the legal developments and important case laws of foreign jurisdiction, I would recommend that in order to face and address the

⁹Clinical legal education can promote social justice lawyering in India see, Margret Martin Barry, “Teaching Social Justice Lawyering: Systematically Including Community Legal Education In Law school Clinics”, 18 *Clinical Law Review*, 2012, at 401.

¹⁰Gene Koo, *supra* note 5, at 6.

¹¹Steve Sheppard, “Academic Freedom: A Prologue”, 65 *Arkansas Law Review*, 2010, at 177.

challenges posed by globalization in a better manner, this comparative law method must be followed. It is also important to state that in comparative law method, we generally chose the jurisdictions like UK and USA. This should not be the universal rule rather one must look to the jurisdictions where the socioeconomic problems and situations are similar.

(c) *Skills Enhancing through the Clinical Legal Education*

Today, India has the largest population of unskilled work force. The lack of a national framework and coherent policy program across the profession for the skills development in the educated youth of the country is hurting the economic capacity and growth of the nation. This is true with respect to the legal profession also. The young law graduates lack the necessary skills and training to comprehend the legal issues involved in the case. It is obvious that skills and nuances of lawyering cannot be inculcated in the students merely through the class room teachings by the law teachers in abstract.

As a departure from the traditional class room teachings, the introduction of clinical legal education in the course curriculum has been a remarkable feature. Students can only truly appreciate law if they carefully observe what goes on in court rooms and lawyers' chambers. The Moot court competitions, law aid clinics and the internships program have been made compulsory by some of the law schools and law colleges. This has certainly given a kind of wide exposure to the students. It is also noteworthy that the lack of seriousness and effective evaluation measures for these training programs blur the distinction between serious and non-serious students. The students in this process get to see the interaction of society with courts and lawyers. It is earnestly hoped that a clinical program in law schools would correct certain undesirable tendencies in contemporary legal education. For instance, it will serve as a half-way house between prolonged isolation in the classroom and the outside world and contribute to the development of realistic values.

Clinical programs can focus on opportunities for students to work in teams and be conscious of how they organize themselves through email, case-management systems, collaborative document editing, etc.¹² However, all clinical programs do not have the required technological support ultimately leading towards lack of skill developments for the students.¹³ Also, law schools emphasize more on thinking like a student rather than a lawyer.¹⁴ Moreover, the stress of traditional law schools has been on individualistic work rather than a collaborative team work, i.e., there is no emphasis on working like a team.¹⁵ Law students have opportunities to develop

¹²Gene Koo, *supra* note 5, at 19.

¹³*Id.*, at 13.

¹⁴*Id.*, at 15.

¹⁵*Id.*, at 16.

authentic practice skills through clinical programs, internships, externships, summer job placements.¹⁶

The legal aid jurisprudence as developed by the Supreme Court of India in plethora of cases has provided avenues to the law students and law colleges to serve the society in a better manner. This aspect highlights the development of poverty jurisprudence in a developing society like ours. The experience of clinical legal education and legal aid clinic in the different jurisdictions reveals that law schools can contribute significantly in the transformation of society with the help of Bench and Bar.

3.5 *Continuing Legal Education*

The Continuing Legal Education is more of a kind of short duration structured course for the lawyers, law teachers, paralegals, etc. The course must be delivered as a quality and skills enhancing capsules to the lawyers of 2–5 years of experience by the leading members of respective Bars. However, it is trite that such short-term courses are being provided but, it lacks seriousness and sometimes it is not delivered by quality resource person. It may be suggested that the respective Bars may select young, bright bunch of lawyers and organize such modules/short term courses.

4 What Is Next/Future

The standards and norms regulating legal education in the country must be uplifted immediately. The vision as outlined in the existing regulatory regime, which all are about 50 years old must be given a new approach and realistic policy should be formulated taking stalk of global reality. The system of legal education in India is facing serious challenges,¹⁷ and drastic measure must be taken without losing time.

A new regulatory approach is required while keeping in mind that the legal education should not be a mode of making profit—as it is a profession which is socially relevant and can have far reaching impact in transforming and building the nation. The fees charged by the law university, law colleges, and law institutes across the India should be regulated. Attempts must be made to attract the best talent towards legal academics. Norms should be fixed not only for maintaining the quality of questions that are set, but also for the marks to be awarded for the

¹⁶Ibid.

¹⁷Justice S.P. Mehrotra, “Re-Inventing Legal Education: Challenges and Opportunities”, Institution Of Judicial Training and Research, 2008, available at: <http://www.ijtr.nic.in/webjournal/6.htm>.

evaluation of papers. In order to give better meaning to the study of law, instructions should not only be provided in courses of substantive and procedural laws but the students of law must also be exposed to problems, social, economic and political of the modern times. For that purpose socioeconomic content of laws should be incorporated in LL.B. curriculum to foster awareness amongst the law students.

People who were trained in law played an important role in India's freedom struggle,¹⁸ and later made the weightiest contribution to the governance process in the early years of nation building.¹⁹ Legal education should embrace within its fold the concept of nation building so that the lawyers we produce have a broader framework and vision to contribute to society through public service.²⁰ All those connected with the maintenance of standards of legal education must, therefore, be prepared to take hard decisions. A concerted action on the part of Bar, the Bench, and the law teachers is called for to improve the deteriorating standards of legal education. It reminds me of words of Chief Justice Burger while addressing the American College of Trial Lawyers, District of Columbia:

... in some jurisdictions up to half of the lawyers who appear in court are so poorly trained that they are not properly performing their job and that their manners and their professional performance and their professional ethics offend a great many people. They are engaging in on-the-job training at the expense of their clients' interests and the public.

Did Chief Justice Burger have in mind the conditions of legal education in India while making the above statement? It is something which requires serious thoughts.

¹⁸Keshav Dayal, "Famous Lawyer Of Freedom Struggle And Trials Of Freedom Fighters" (2010).

¹⁹The Role of Lawyers Is Not Confined To Courts: PM, Rediff News (May 17, 2010), available at <http://news.rediff.com/column/2010/may/17/role-of-lawyer-not-confined-to-courts-says-pm.htm>.

²⁰Reena N. Glazer, "Revisiting The Business Case for Law Firm Pro Bono", 51 *S. Texas Law Review*, 563, 565 (2010).

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